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No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOES 1-4,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Dated: April 18, 1988

QUESTION PRESENTED

Whether a civil protective order entered by a federal judge that specifically bars disclosure of deposition transcripts to federal investigative agencies may be overruled by another judge to permit disclosure to a federal grand jury where there is no showing by the government of any extraordinary circumstances or compelling need for the transcripts?

PARTIES TO THE PROCEEDINGS

Petitioners John Does 1 through 4, four individuals who are either targets or subjects of a federal grand jury investigation in the District of Maryland, were appellants in the United States Court of Appeals for the Fourth Circuit. The United States of America was the appellee in the court of appeals and is the respondent here. Petitioners were not parties to the civil litigation in which the protective order was entered but were non-party deposition witnesses.

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, John Does 1 through 4, respectfully pray that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 12, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, reported at 836 F.2d 1468 (4th Cir. 1988), is reprinted as Appendix A to this Petition. The opinion of the United States District Court for the District of Maryland, reported at 659 F. Supp. 628 (D. Md. 1987), is reprinted as Appendix B hereto. The order of the court of appeals denying the timely petition for rehearing, with suggestion for rehearing *en banc*, is not reported, and is reprinted as Appendix C hereto. The further order of the court of appeals staying its mandate pending timely application to this Court for a writ of certiorari is reprinted as Appendix D to this Petition.

JURISDICTION

The opinion of the court of appeals affirming the district court's order denying the motion to quash the grand jury subpoenas and requiring production of deposition transcripts was entered on January 12, 1988. A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

The Fifth Amendment to the United States Constitution provides in part that "no person . . . shall be compelled in any criminal case to be a witness against himself, . . ." Rule 26(c) of the Federal Rules of Civil Procedure provides, in pertinent part:

> Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: . . . (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; . . . (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; . . . .

STATEMENT OF THE CASE

Petitioners are four individuals who are either targets or subjects of a pending federal grand jury investigation in Maryland that is examining the activities of Community Savings & Loan, Inc. and its EPIC group of subsidiaries. Petitioners were officers and/or directors of some or all of those entities. Each of the four petitioners was subpoenaed and did attend, as a third party, a deposition in civil multi-district litigation in the United States District Court for the Eastern District of Virginia, *In re: EPIC Mortgage Insurance*

Litigation (E.D. Va. Docket No. 680) (Judge Claude M. Hilton).

Petitioners participated in the depositions in reliance on a valid protective order issued by the federal district judge presiding over the Virginia litigation that sealed the deposition transcripts from disclosure "to any state or federal investigating agency or authority," and provided that they could not be used in connection with any proceedings "other than these actions except by further order of this Court." *See* Pet. App. 3a. Despite the protective order, the United States, through the Office of the United States Attorney for the District of Maryland, caused grand jury subpoenas to issue for the deposition transcripts and thereafter persuaded a federal district judge in the District of Maryland (Judge John Hargrove) to deny motions to quash the subpoenas and require production of the deposition transcripts. Pet. App. 4a.

At the time they received the third party deposition subpoenas petitioners were aware that a federal grand jury had been convened in Baltimore to investigate the activities of Community Savings & Loan and its EPIC group of subsidiaries. They recognized that they might incriminate themselves in connection with the criminal investigation if they testified at depositions in the civil litigation. They therefore moved for a stay of the depositions, which motion the district court denied because of the rights of the parties to the civil litigation to have their dispute resolved promptly. Pet. App. 2a. At the same time, however, the district court, recognizing the validity of petitioners' concerns about the ongoing grand jury investigation, proposed an alternative. The court issued an oral protective order, and shortly thereafter a written protective order negotiated by the parties, sealing the depositions and prohibiting the dissemination of the deposition transcripts to any state or federal investigating agency or authority unless permitted by a subsequent order of that court or a court having jurisdiction over the trial of the civil cases. Pet. App. 3a. Petitioners appeared for their depositions in reliance on the protective order.

After the depositions took place, the Assistant United States Attorney conducting the grand jury investigation in Maryland requested copies of the transcripts of all the depositions in the Virginia litigation from defense counsel in that case. Defense counsel advised the government of the existence of the protective order and declined to produce the protected transcripts. Pet. App. 3a. Thereafter the Assistant United States Attorney caused the grand jury to issue subpoenas directing counsel for the plaintiffs in the Virginia litigation to produce the transcripts of petitioners' depositions. Pet. App. 3a, 4a.

Faced with the choice of either violating the protective order or ignoring the grand jury subpoenas, plaintiffs' counsel, as the protective order provided, advised counsel for petitioners that they had received the subpoenas. Petitioners filed motions to quash the grand jury subpoenas with the district court in Maryland on the ground that the Virginia court's protective order prohibited production of the deposition transcripts unless and until the government sought and received a modification of the protective order from the district court in Virginia.

Before acting on the motion to quash, the district judge in Maryland instructed the government to seek clarification from the district judge in Virginia whether the protective order in fact was intended to preclude access by the grand jury to the deposition transcripts. In Virginia Judge Hilton held a prompt hearing at which he confirmed that the order was intended to preclude access by the grand jury: "[t]here isn't any question when I entered this protective order I intended it to apply to the grand jury as well as any other investigative person or body of the state or federal government. . . ." Pet. App. 27a n.3. Judge Hilton also noted that the protective order was intended to encourage reliance by petitioners:

> But after making the determination that I require these people to testify, I entered a protective order, with the understanding that this would satisfy their concerns with the fifth amendment privilege, allowing this very complicated piece of litigation to go on.

Pet. App. 9a n.7.

The government expressly did not seek to intervene in the Virginia litigation or ask Judge Hilton to modify his protective order. Rather, it returned to the district court in Maryland and reiterated its demand for the protected material. Judge Hargrove then issued an opinion and order denying petitioners' motion to quash the grand jury subpoenas and directing production of the deposition transcripts (Pet. App. 26a), thus effectively reversing the decision of his fellow district judge in Virginia.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit and sought expedited briefing and argument, which were granted. The case was argued on July 31, 1987. On January 12, 1988, in a split decision a panel of the court of appeals affirmed the denial of the motion to quash the subpoenas. Pet. App. 1a.

The panel majority rejected the balancing approach adopted by the Second Circuit when faced with an identical situation involving the competing interests of the grand jury and civil discovery. The panel concluded that any balancing of interests that is appropriate must be struck in favor of the grand jury's need to gather evidence, because the grand jury, "subject only to the limitations of a fifth amendment, has the right to all relevant evidence." Pet. App. 12a. "A civil protective order," it said, "may seriously impede a criminal investigation by a grand jury" because "[u]ncoerced testimony given in a civil action may provide important and relevant information to a grand jury investigation." *Id.* at 13a.

The court also concluded that a protective order issued to protect a deponent's Fifth Amendment privilege against self-incrimination is effectively a grant of immunity and therefore an unconstitutional usurpation by the judiciary of an

executive branch function. Pet. App. 13a. The panel suggested that staying discovery—the very relief petitioners sought and were denied by Judge Hilton—was a preferable alternative to the kind of protective order entered in this case. Pet. App. 15a. The court adopted a *per se* rule favoring enforcement of grand jury subpoenas and rejected a case-by-case balancing and a compelling need test for disclosure of protected discovery materials to grand juries as both unworkable and unconstitutional. Pet. App. 17a.

Judge Sprouse in his dissent identified the principal issue before the court as the conflict between the need of a grand jury to gather evidence and the need of district courts and civil litigants to facilitate efficient resolution of disputes, but concluded that balancing these competing interests, as the Second Circuit does, was the only fair and logical procedure. Pet. App. 20a. Recognizing that the deponents would not have provided the deposition testimony but for their reliance on the protection given by Judge Hilton, he noted that the majority decision means that the government now receives evidence it would never have obtained "but for overriding a protective order that spawned the deposition in question." Pet. App. 22a. "[L]itigants in our civil justice system," he stated, "must be able to rely on assurances of confidentiality given by trial judges." Pet. App. 20a. In practical terms, he concluded:

> The majority eschews discrete balancing of competing interests and creates a per se rule overriding Rule 26(c) protective orders when opposed by grand jury subpoenas. It reaches this result by balancing abstract concepts rather than the facts of each case. In the process I feel it has swept away a longstanding tool for the management of civil litigation. Litigants relying on protective orders offer a significant amount of evidence in civil cases, but our ruling today will squelch the desire of future deponents to give evidence under a protective order. No longer will deponents be able to rely on the power of a United States District Court to limit disclosure of their testimony to third parties. The government will become a new player in the civil discovery process, forcing deponents to invoke the fifth amendment and thus retarding effective and informative discovery.

Pet. App. 21a.

A timely petition for rehearing, with suggestion for rehearing *en banc*, was denied on March 18, 1988 by a vote of 7-4. Pet. App. 39a. The court of appeals granted petitioners' motion for stay of the mandate on March 30, 1988. Pet. App. 40a. The timely filing of this petition for a writ of certiorari has continued that stay until final disposition by this Court. *See* Fed. R. App. P. 41(b).

REASONS FOR GRANTING THE WRIT

This is a case of exceptional importance, first, because it creates a conflict between decisions of the Second and Fourth Circuits in a situation where national uniformity is essential and second, because of its long-term implications both for criminal law enforcement and for civil litigation.

By adopting a *per se* rule that grand jury subpoenas always take priority over civil protective orders, the decision of the Fourth Circuit permits a district judge supervising a grand jury to overrule an acknowledged lawful order of another district judge in another district supervising discovery in related civil litigation. This is contrary to the rule in the Second Circuit, which requires judges to balance competing interests and requires a showing of compelling need or extraordinary circumstances in order to obtain protected deposition materials. The Fourth Circuit decision also permits the government to seek relief from another judge without making its case for disclosure to the judge whose order is at issue.

The panel majority effectively has eliminated the use of protective orders in favor of either invocations of the Fifth Amendment that deny civil litigants the evidence they seek or court-ordered stays of civil discovery until the completion of often lengthy grand jury investigations. The result will be incomplete and inconclusive discovery, instead of a balancing of the rights and interests of the parties and witnesses in the civil litigation against legitimate criminal law enforcement interests. Respect for the judicial system, valid court orders, the rights of litigants who rely on such orders and judicial precedent require the intervention of this Court.

I. The Decision Of The Court Below Permits One District Court To Reverse The Decision Of Another And Conflicts With A Decision of Another Circuit

This case squarely presents a conflict between the competing imperatives of the civil and criminal justice systems: the power of a district court to encourage discovery in civil cases by means of Rule 26(c) protective orders, and the power of a grand jury to gather evidence for a criminal investigation through a subpoena *duces tecum*. As the Second Circuit observed in *Palmieri* v. *New York*, 779 F.2d 861, 864 (2d Cir. 1985): "[t]his case lies at the juncture of two competing imperatives in our judicial system: the need of a . . . grand jury to gather evidence for ongoing criminal investigations, and the need of our district courts and civil litigants to facilitate efficient resolution of disputes. . . ." Unlike the Fourth Circuit, the Second Circuit concluded that these competing interests should be accommodated by a balancing of interests rather than automatically upholding the supremacy of the grand jury over a valid protective order.

In *Palmieri* the court reviewed a district court decision that granted a grand jury access to sealed civil settlement materials because of the importance of the grand jury's ongoing investigation of possible antitrust violations.[1] In reversing the district court's actions, the Second Circuit stated:

> We hold that, absent an express finding by the district court of improvidence in the magistrate's initial grant of the protective orders or of extraordinary circumstances or compelling need by the State for the information protected thereunder, it was error for the district court to modify the magistrate's orders.

Palmieri v. *New York*, 779 F.2d at 862. A witness "should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government . . . such an order should not be vacated or modified merely to accommodate the Government's desire to inspect

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[1] The protective order in *Palmieri* was similar to the one here: it prevented disclosure "to any other person, including any government agency or instrumentality. . . ." *Palmieri* v. *New York*, 779 F.2d at 863.

protected testimony for possible use in a criminal investigation. . . ." *Id.* at 864. The *Palmieri* court thus concluded that the district court could modify a protective order only on a showing by the government of "extraordinary circumstances" or "compelling need" of the grand jury for the protected material.

Palmieri is one in a series of decisions in which the Second Circuit has established a "compelling need" standard for the government to obtain civil litigation materials that have been protected from disclosure by a civil protective order. In *Martindell* v. *ITT,* 594 F.2d 291 (2d Cir. 1979), the Department of Justice informally sought deposition transcripts protected from disclosure by a district court order because it believed the testimony would not otherwise be available due to invocation by deponents of their Fifth Amendment privilege against self-incrimination. Noting the existence of a valid civil protective order, the Second Circuit held that the government must show either "extraordinary circumstances" or "compelling need" for access. *Id.* at 296. Without such a showing, the just, speedy and inexpensive resolution of civil disputes would be threatened because litigants and witnesses could not rely on such orders. *Id.*

In the absence of court assurance that the depositions were protected from disclosure, the Second Circuit concluded that witnesses would decline to provide essential testimony:

> Unless a valid Rule 26(c) protective order is to be fairly and fully enforceable, witnesses relying on such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences. In short, witnesses might be expected to refuse to testify pursuant to protective orders if their testimony were to be made available to the government for criminal investigatory purposes in disregard of those orders.

Martindell v. *ITT,* 594 F.2d at 295-96. Balancing these interests against those of criminal law enforcement, the

court concluded there were neither "extraordinary circumstances" nor a showing of "compelling need" by the government. *Id.* at 296.[2]

As the dissenting opinion below noted, the "compelling need" balancing test reflects the Second Circuit's "long-standing emphasis on the importance to civil discovery of upholding protective orders . . .," and a recognition that the government has powers far broader than those of any private party and thus more ways of seeking and obtaining information. Pet. App. 20a, 22a.[3] The Second Circuit's "compelling need" analysis provides a reasoned method of balancing the needs of the competing civil and criminal objectives. *Id.* at 21a. In rejecting this "compelling need" test, and instead establishing a *per se* rule that a grand jury subpoena seeking materials produced in civil discovery will in every instance override a valid civil protective order, the Fourth Circuit has created a direct and significant conflict in the circuits that must be resolved by this Court.

The panel majority justifies its departure from the Second Circuit's "compelling need" balancing approach on three grounds: (1) a civil protective order stands as a "significant impediment" to the grand jury's established "right to every man's evidence" (Pet. App. 5a, 12a); (2) the issuance by judges of civil protective orders where there is a pending grand jury investigation violates separation of powers principles and is unconstitutional because such orders are tantamount to grants of immunity that can only be issued by

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[2] Although *Martindell* involved an informal request by the government for the materials covered by a protective order, the Second Circuit subsequently has applied the "compelling need" standard where the government has proceeded by formal means to obtain protected discovery materials. *See Minpeco* v. *Conticommodity Services*, 832 F.2d 739, 743 (2d Cir. 1987) ("the 'compelling need' standard has been consistently and uniformly followed in this circuit . . . ."); *Palmieri* v. *New York*, 779 F.2d at 864 (grand jury sought protected material both through a subpoena *ad testificandum* and by seeking modification of the protective order).

[3] *See Martindell* v. *ITT*, 594 F.2d at 296; *Palmieri* v. *New York*, 779 F.2d at 866; *H.L. Hayden* v. *Siemans Medical Systems*, 797 F.2d 85, 88 (2d Cir. 1986); *Minpeco* v. *Conticommodity Services*, 832 F.2d at 742.

the executive (Pet. App. 13a); and (3) protective orders have never been very useful because they can be circumvented by leaks, can be modified later and can be defeated by recalcitrant deponents who assert the Fifth Amendment privilege against self-incrimination (Pet. App. 14a, 15a). The very statement of the Fourth Circuit's rationale for its *per se* rule underscores the wisdom of the Second Circuit's approach.

While civil protective orders do prevent the grand jury from obtaining transcripts of depositions given in reliance on such orders, it is inaccurate to say that protective orders impede the right of the grand jury to obtain "every man's evidence." The grand jury's sweeping power to gather evidence directly from deponents by subpoenas to testify or grants of immunity if necessary, remains intact and militates against further enlargement at the expense of the civil justice system. *See H.L. Hayden* v. *Siemans Medical Systems*, 797 F.2d at 88; *Palmieri* v. *New York*, 779 F.2d at 866. Indeed, a protective order "impedes" the grand jury only in the sense that it prevents access to evidence that never would have existed but for the existence of the protective order. *See Palmieri* v. *New York*, 779 F.2d at 865. As Judge Sprouse noted in his dissent: "The deponents here would not have provided the deposition testimony but for their reliance on the district court's statement that the testimony would be beyond the government's reach." Pet. App. 21a.

The majority's conclusion that issuance of protective orders in circumstances like those presented here amounts to judicial conferral of immunity and thus violates separation of powers does not withstand analysis and mischaracterizes the effect and scope of protective orders. As the dissenting opinion stated, a protective order, unlike a grant of immunity, is a limited device to foster quick and productive discovery. Pet. App. 23a. A protective order does not alter the deponent's potential culpability and always remains subject to modification, reflecting the authority of the trial judge to manage discovery and control access to judicial records. *Palmieri* v. *New York*, 779 F.2d at 865. The panel majority vastly understates the utility of protective orders in our civil justice system and, by undermining the ability of litigants

and witnesses to rely on them with confidence, "has swept away a long-standing tool for the management of civil litigation." Pet. App. 21a (Sprouse, J., dissenting). *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 34-36 (1984); *Minpeco* v. *Conticommodity Services*, 832 F.2d at 742; *Martindell* v. *ITT*, 594 F.2d at 295.

The dissenting opinion below recognizes the importance of protective orders to the civil justice system, and the consequent need for a legitimate balancing of all the interests involved, civil and criminal. Particularly where Fifth Amendment interests are involved, reliance on civil protective orders should be accorded great weight and the balancing approach is particularly apt. *Martindell* v. *ITT*, 594 F.2d at 296. By rejecting a balancing test and the flexibility it affords, the majority below has replaced Rule 26(c) "with a new presence in civil litigation—the roving eye of government and the attendant rush by affected civil litigants to invoke the fifth amendment in discovery." Pet. App. 25a (Sprouse, J., dissenting). This result should not be permitted to stand.

II. The Decision Of The Court Below Involves An Important Issue That By Its Very Nature Requires Uniform Treatment Throughout The Federal System

The issue of resolving the competing demands of civil and criminal justice is too important to tolerate conflicting treatment in the circuit courts. The constitutional, jurisprudential and practical implications are far-reaching and serious. At stake for these petitioners is their very significant constitutional interest in preserving their Fifth Amendment privilege against self-incrimination. At stake for the future is whether one federal district court judge should be permitted to reverse a fellow judge on the ground that criminal law enforcement is more important than civil litigation. Also at stake in a very real sense is whether Rule 26(c) protective orders have any further efficacy where the events in question are both the subject of civil litigation and a grand jury investigation.

The panel majority permits the government virtually unreviewable access to civil discovery materials, whether or not governed by a civil protective order, simply by issuance of a grand jury subpoena. The procedural history of this case underscores the serious consequences that will arise if this result is permitted to stand. Where the civil protective order is issued by a district judge in one district and the grand jury subpoena is enforced by a district judge in another district (perhaps, in the future, even in another circuit), the result is that the second district judge inevitably overrules the order of a fellow judge without giving any deference to the original reasons for entering the order. As the dissent noted, "Judge Hargrove effectively 'reversed' the decision of Judge Hilton," Pet. App. 23a n.3, and permitted an "end run" around petitioners' privilege against self-incrimination. Pet. App. 21a.

The decision of the panel majority thus inherently and automatically awards to a district court overseeing the grand jury a prerogative to reverse the order of the district court managing the civil litigation, an unseemly result inconsistent with all notions of judicial comity and deference. This tension between courts is neither productive or necessary. As the dissent stated, "seeking modification [of the protective order] from the issuing judge and appealing, if necessary, an adverse decision, would conform with common trial and appellate practice, and avoids the friction inherent in the subpoena procedure." Pet. App. 23a n.3.

By sanctioning the intrusion of government prosecutors into the civil discovery process and encouraging the use of broad grand jury subpoenas as discovery devices in criminal cases, the majority encourages the creation of conflicts and the violation of comity among the district courts. As the dissent eloquently stated: "What prosecutor will now invoke the less intrusive process of seeking modification of a protective order from the issuing judge when he knows he has virtually unreviewable authority to override the judge's order simply by shielding himself in the cloak of the grand jury's 'broad investigative function?' " Pet. App. 23a n.3.

Equally important, no tangible benefits to the criminal justice system ultimately will result from ignoring the "compelling need" balancing test in favor of a *per se* rule requiring production of otherwise protected materials to a grand jury. Under the present conflicting state of the law, only three results are possible: either witnesses facing the prospect of a potential criminal investigation will risk testifying only if they are certain that the issue will be decided in the Second Circuit, or such witnesses simply will refuse to testify, or district court judges will have no choice but to stay civil discovery until completion of grand jury investigations.

When witnesses, unwilling to risk the application of the harsher Fourth Circuit result, refuse to testify or when depositions are stayed for inordinate periods of time, civil litigants will be deprived of potentially critical evidence. Meanwhile, the grand jury will be left in exactly the same position in which it would have been had there never been any civil litigation: it will not have the testimony of subjects and targets of its investigation unless it obtains such testimony directly.

Thus, what the dissent correctly terms "a valuable method of facilitating discovery", the Rule 26(c) protective order (Pet. App. 24a), will be discarded with no compensating gain anywhere in the criminal justice system. If the decision below stands, in the future deponents in the position of petitioners will know not to rely on a civil protective order. Ironically, the only case in which protected discovery material will be made available to the grand jury is this case, where petitioners relied in good faith on a district judge's order that sought to protect their Fifth Amendment privilege. The conflicting approaches of the Second and Fourth Circuits on an issue of this importance cannot be tolerated and must be resolved by this Court.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: April 18, 1988

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APPENDIX A
IN RE GRAND JURY SUBPOENA

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

v.

(UNDER SEAL), DEFENDANTS-APPELLANTS

No. 875565

UNITED STATES COURT OF APPEALS,
FOURTH CIRCUIT

Argued July 31, 1987

Decided Jan. 12, 1988

Eugene Propper (Lane & Edson, P.C. on brief); Anne Davies Smith (White & Case; John R. Fornaciari; Mark H. Tuohey, III; Kenneth A. Grigg; Pierson, Ball & Dowd, Washington, D.C., on brief) for defendants-appellants.

Barbara Slaymaker Sale, Asst. U.S. Atty. (Breckinridge L. Willcox, U.S. Atty.; Baltimore, Md., Joyce K. McKee, Asst. U.S. Atty., on brief), for plaintiff-appellee.

Before WINTER, Chief Judge, and MURNAGHAN and SPROUSE, Circuit Judges.

HARRISON L. WINTER, Chief Judge:

Four third-party deponents in a civil action in the Eastern District of Virginia appeal from a judgment of the district court of Maryland denying their motion to quash two grand jury subpoenas issued by a special grand jury in Maryland to an attorney in Virginia requiring production of their sealed depositions taken during the civil litigation in Virginia. The appellants-deponents moved to quash the subpoenas in the district court of Maryland on the ground that the depositions were sealed by a protective order issued by the district court in Virginia. The district court of Maryland denied the motion to quash, concluding that a civil protective order cannot be used to shield discovery materials from a subpoena issued by a grand jury. We affirm.

I.

A special grand jury in the district of Maryland is investigating the events surrounding the collapse in September, 1985, of Community Savings & Loan (Community), which was part of a group of affiliated organizations whose parent corporation is Equity Programs Investment Corporation (EPIC). The appellants-deponents in this case are former officers and directors of EPIC and its subsidiaries. In 1985, the state of Maryland placed Community into conservatorship and EPIC filed for bankruptcy. Subsequently, several private mortgage insurance companies which had insured mortgages held by EPIC brought suit in the Eastern District of Virginia against EPIC Mortgage, Inc. (a subsidiary of EPIC), numerous banks, and the Maryland Deposit Insurance Corporation, the conservator for Community. The appellants-deponents are not parties to the litigation in the Eastern District of Virginia.

In 1986, plaintiffs in the civil action in Virginia noticed the depositions of the appellants. Some of these deponents became concerned about complying with this order because of the ongoing grand jury investigation in Maryland. The deponents moved for a stay of discovery pending completion of the grand jury investigation in order to avoid being forced to choose between the possibility of self-incrimination and asserting their fifth amendment rights. After a hearing, the Virginia district court denied the motion for a stay. With the consent of all parties and the deponents, the court instead orally issued a protective order sealing the deposition transcripts and limiting access to the transcripts to the parties in the civil action. The district court requested that the parties prepare a written protective order for the district court to consider. The parties submitted the written order to the district judge on October 8, and it was signed the next day.[1]

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[1] Two of the appellants-deponents were deposed following issuance of the oral protective order, but before the written order was signed. The other two deponents were deposed in November following issuance of the written order. Prior to their November depositions, the attorneys for the

(footnote continued on next page)

The written protective order sealed deposition transcripts that were filed with the court and limited access to these transcripts to necessary court personnel, the deponents, and the parties to the civil action and their counsel. The protective order specifically stated:

> IT IS FURTHER ORDERED that the transcript or record of the sealed depositions and the information contained therein shall not be made available to any state or federal investigating agency or authority, and shall not be used in connection with any proceedings other than these actions, except by further order of this Court.

The protective order also provided for possible modification:

> IT IS FURTHER ORDERED that this Order may be modified only by further order of this Court or any other court having jurisdiction over the trial of any of these cases upon notice to the deponents and the parties to this case with reasonable opportunity to respond.

In late 1986, following the taking of these depositions, the Assistant United States Attorney guiding the special grand jury investigation in Maryland requested copies of the deposition transcripts in the Virginia litigation from an attorney for a defendant in that action. The attorney provided the grand jury with the requested materials, except for those depositions sealed by the protective order. On December 16, 1986, the grand jury issued a subpoena *duces tecum* requiring an attorney for the plaintiffs in the Virginia action to produce the deposition transcripts of two of the appellants in this action. On January 21, 1987, the grand jury issued a second subpoena requiring an attorney to

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two deponents obtained oral stipulations from all counsel in the civil action that the depositions were sealed under the terms of the protective order. In February, the district court signed an order confirming the oral stipulation sealing the November depositions. The government maintains on this appeal that the appellants who were deposed prior to entry of the written protective order were not entitled to rely on the protective order in waiving their fifth amendment privilege because the oral protective order had not yet been reduced to a writing. The district court made no findings in this regard. However, we need not reach this factual issue in light of our disposition of the legal question of whether a civil protective order may provide grounds to quash a grand jury subpoena.

produce the deposition transcripts of the remaining appellants. Appellants subsequently filed their motion to quash.

Following a hearing on the motion to quash, the deponents, at the request of the Maryland district judge, scheduled an appearance before the Virginia district court in order to clarify the protective order. During that hearing, the district judge in Virginia explained that the protective order was intended to bar access to the transcripts by the Maryland grand jury and that the deponents were entitled to rely on the order to protect their fifth amendment rights. The government subsequently stipulated that the protective order was intended to apply to the Maryland grand jury. On April 21, 1987, the district court of Maryland denied the motion to quash.

II.

The appellants seek to employ a civil protective order as a defense against compliance with a grand jury subpoena demanding production of deposition transcripts obtained during discovery in a civil action to which they were not parties. The issue of the need to comply with the grand jury subpoena is properly before this court. The government had two options in seeking to obtain the deposition transcripts: it could seek permissive intervention in the civil action in Virginia pursuant to Fed. R. Civ. P. 24(b) to request that the protective order be modified or vacated, or it could subpoena the transcripts as part of the ongoing grand jury investigation. *Martindell* v. *International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2 Cir. 1979). The government validly chose the latter course in this action.[2]

The issue presented in this case is an important one of first impression in the circuit courts concerning the legal authority of the grand jury. The Maryland district court denied the motion to quash the subpoena on the ground that it lacked

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[2] The appellants were entitled to appeal the district court's denial of their motion to quash the subpoena without risking contempt because the subpoena was addressed not to them, but to an attorney in the Virginia litigation. Perlman v. United States, 247 U.S. 7, 13, 38 S.Ct. 417, 419, 62 L.Ed. 950 (1918).

the authority to quash the grand jury's subpoena *duces tecum* notwithstanding that the deposition transcripts sought to be obtained were sealed under the terms of a valid civil protective order issued by another federal district court. In reaching this decision, the Maryland district court assumed that the deponents relied on the protective order during the taking of depositions and that the protective order was validly issued. The district court appropriately framed the legal issue for consideration, and we agree with its conclusion.[3]

The question of the grand jury's authority presented in this case involves the intersection of three interests: the authority of a grand jury to gather evidence in a criminal investigation; the deponents' right against self-incrimination; and the goals of liberal discovery and efficient dispute resolution in civil proceedings. We begin by discussing these respective interests.

A.

The sweeping power of the grand jury to compel the production of evidence has been recognized since the nation's founding. *Blair* v. *United States*, 250 U.S. 273, 280, 39 S.Ct. 468, 470, 63 L.Ed. 979 (1919). Federal grand juries derive the authority to investigate criminal wrongdoing by requiring testimony and the production of documents from the United States Constitution, the Federal Rules of Criminal Procedure, and federal statutes. U.S. Const., Amend. V; Fed.R.Crim.P. 6; 18 U.S.C. §§ 3321 *et seq.*

The grand jury has the authority to require the production of evidence and testimony of witnesses because "the public . . . has a right to every man's evidence." *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). While grand jury investigations are

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[3] The government's primary contention on appeal is that the Virginia district court erred by entering a protective order to protect the fifth amendment rights of the deponents. The Maryland district court did not consider this contention and we do not address it. This contention should properly be advanced to the Virginia district court in the first instance because it concerns the validity of its civil protective order and does not concern the authority of the grand jury's subpoena.

subject to constitutional limits, the grand jury has wide latitude in gathering evidence because this power is essential to the task of criminal investigations. Thus, the grand jury's power to investigate criminal offenses is "unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *United States* v. *Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974). The grand jury has the right to obtain and consider all evidence relevant to its deliberations because the nature of the crime and the identity of the accused must be ascertained based upon this evidence at the conclusion of the grand jury's inquiry. *Blair*, 250 U.S. at 282, 39 S.Ct. at 471. Because the grand jury enjoys important constitutional status, the grand jury is not subject to the direction of the court with respect to these essential functions. *United States* v. *United States District Court*, 238 F.2d 713 (4 Cir. 1956), *cert. denied sub nom., Valley Bell Dairy Co.* v. United States, 352 U.S. 981, 77 S.Ct. 382, 1 L.Ed. 365 (1957). As a result, a court may not intervene in the grand jury process absent compelling reason. *United States* v. *Dionisio*, 410 U.S. 1, 16-18, 93 S.Ct. 764, 772-773, 35 L.Ed.2d 67 (1973); *In Re Grand Jury Subpoenas*, April, 1978 (*Harvey*), 581 F.2d 1103, 1108 (4 Cir. 1978), *cert. denied sub nom., Fairchild Industries, Inc.* v. *Harvey*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979).

B.

The grand jury subpoena in this case seeks discovery materials which, we assume for purposes of this appeal, were produced in reliance on the Virginia district court's protective order. At first blush, resolution of this case might appear to depend on balancing the deponents' right against self-incrimination as secured by the protective order and the grand jury's interest in effective investigation of crime. But this is not so, because the deponents' fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of civil protective orders. Deponents were entitled to rely only on their own silence or a grant of immunity to protect their rights, otherwise they risked waiving those rights.

In contrast with a grant of immunity, the government may not use a protective order to compel a witness to testify during a criminal or civil proceeding. Absent a grant of immunity, the deponents were entitled, with or without a protective order, to assert their fifth amendment privilege in answer to potentially incriminating questions in a civil proceeding. In *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983), the Supreme Court established this principle by reversing a contempt order entered against a civil litigant who had not received a grant of immunity and who asserted his fifth amendment privilege against self-incrimination in deposition testimony. The Court ruled that a party to a civil action has a right to assert the privilege until immunity is granted by officials of the Department of Justice. *Id.* at 261, 103 S.Ct. at 616.

Deponents argue that the burden of silence in civil litigation may unduly punish an individual for asserting the right against self-incrimination. A party's silence, for example, may bar that party from asserting facts which would allow him to prevail in litigation which will have severe financial consequences for the loser. Silence may also create inferences which are relevant and adverse to the party maintaining such silence. On the facts of this case, these concerns are remote because the deponents had no stake in the outcome of the civil litigation.

Even if such a risk were present, however, the burden placed on an individual's right to avoid self-incrimination by the institution of a civil lawsuit by a private party does not implicate values protected by the fifth amendment. In *Baxter* v. *Palmigiano*, 425 U.S. 308, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976), for example, the Supreme Court held that the fifth amendment privilege does not protect state prison inmates against the drawing of adverse inferences from the failure to testify during disciplinary proceedings which could result in punitive action. The Court, in part, relied on the prevailing rule that "the fifth amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Id.* at 318, 96 S.Ct. at 1558. Justice

Brennan, joined by Justice Marshall, dissented from the conclusion that the fifth amendment privilege did not extend to prison disciplinary hearings, but agreed that he would "have difficulty holding such an inference impermissible in civil cases involving only private parties." *Id.* at 334, 96 S.Ct. at 1556 (Brennan, J., dissenting).[4] *See Lefkowitz* v. *Cunningham*, 431 U.S. 801, 808 n.5, 97 S.Ct. 2132, 2137 n.5, 53 L.Ed.2d 1 (1977).[5] Thus, the security given to the deponent's interest in avoiding self-incrimination by a civil protective order does not outweigh the substantial government interest present in this case.[6]

C.

While protective orders do not significantly advance fifth amendment interests, they do aid the civil courts in facilitating resolution of private disputes. Federal Rule of Civil Procedure 26(c) authorizes the district courts to issue protective orders to encourage full disclosure of all relevant evidence in order to "secure the just, speedy, and inexpensive determination" of civil disputes. Fed. R. Civ. P. 1. Absent such orders, witnesses would be deterred from providing

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[4] In many civil cases the burden placed on a person's silence may be unavoidable. Where a plaintiff has gathered sufficient evidence to establish a claim prior to discovery, a defendant who risks incrimination by speaking will inevitably face the choice of forsaking silence or losing a civil judgment, even if the defendant's silence is not used against him. *See* 8 Wright & Miller, Federal Practice & Procedure § 2018 & n.49 (1970). A plaintiff whose claim requires incriminating testimony will likewise always face the choice of speaking or forsaking his prayer for redress. In either case, a district court may reduce the risk of a party's silence by not dismissing an action for failing to cooperate with discovery, but the party will nonetheless face the inevitable judgment of the trier of fact who must make a decision based on an imbalanced presentation of the evidence.

[5] *See also National Acceptance Co. of America* v. *Bathalter*, 705 F.2d 924, 929 (7 Cir. 1983) ("After *Baxter* there is no longer any doubt that at trial a civil defendant's silence may be used against him, even if that silence is an exercise of his constitutional privilege against self-incrimination").

[6] Fifth amendment and ethical concerns obviously would be raised, however, if the government directly or indirectly sponsored a civil lawsuit or discovery requests in a civil lawsuit for the purpose of aiding a criminal investigation. *See United States* v. *Kordel*, 397 U.S. 1, 10-11, 90 S.Ct. 763, 768-769, 25 L.Ed.2d 1 (1970). There is no allegation in this case of such an improper purpose.

essential testimony in civil litigation, thus undermining the adversary process. *Martindell*, 594 F.2d at 295.

Assertion of the privilege against self-incrimination may disrupt or thwart civil litigation and discovery in a wide variety of cases. The privilege may slow or thwart the efficient resolution of many civil cases because the privilege applies not only to information which is itself incriminating but also to information relevant to civil liability which provides a clue leading to evidence of criminal conduct. *Huffman* v. *United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951) (privilege applies if a response might provide a clue leading investigators to discover facts that could constitute links in a chain of circumstantial evidence proving criminal misconduct). Thus, the privilege may apply in antitrust litigation, commercial litigation and securities actions involving fraud, personal injury actions involving criminal negligence, or civil rights actions involving assault, because these civil actions may elicit information tending to demonstrate the element or elements of a crime. *See, generally*, Heidt, The Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062, 1065-1071 (1982).

The assertion of the privilege against self-incrimination in civil cases can impose severe burdens on civil litigants.[7] Invocation may occur in the answer to a complaint or in response to interrogatories, deposition questions, or requests for admissions. The assertion of the privilege prior to trial may thus significantly reduce a party's chances of prevailing on the merits of his claim. The lack of direct access to such information may also prolong civil litigation and increase its costs. As a result, assertion of the privilege forces civil litigants to share the cost of the right to silence of the individual asserting the privilege.

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[7] In this case, for example, the district court in the Eastern District of Virginia issued a protective order because of this concern:

> But after making the determination that I require these people to testify, I entered a protective order, with the understandinq that this would satisfy their concerns with the fifth amendment privilege, allowing this very complicated piece of litigation to go on.

We must therefore weigh the extent to which protective orders insure the efficient resolution of civil disputes against the interest of obtaining all relevant evidence during a grand jury's criminal investigation.

III.

While no court of appeals has directly addressed the issue in this case, there is a line of cases in the Second Circuit, relied on by both parties, which discusses the principles at stake here. The first, *Martindell* v. *International Telephone and Telegraph Corp., supra*, concerned an informal government request to a federal district court for copies of deposition transcripts which were the subject of a Rule 26 protective order. The court affirmed the district court's decision to deny the request, concluding that the interest in protecting efficient resolution of civil disputes outweighed the interest of the government in effective law enforcement when such interest was expressed "simply by picking up the telephone or writing a letter to the court." 594 F.2d at 294. The court in *Martindell*, however, did not express an opinion on how these interests should be balanced when a grand jury subpoena seeks to override a valid protective order. 594 F.2d at 296 n. 5 & 6.

In *United States* v. *GAF Corporation*, 594 F.2d 10 (2 Cir. 1979), the Second Circuit dealt with an attempt by federal antitrust prosecutors to obtain information covered by a civil protective order through enforcement of a civil investigative demand (CID,) issued under the authority granted to the Department of Justice by the Antitrust Civil Process Act of 1976, 15 U.S.C. §1312. The court enforced the CID, relying on the authority given by the statute to federal prosecutors to seek such information. *GAF Corporation* supports enforcement of the subpoena here because the scope of the grand jury power under the Constitution and federal law is at least as broad as that granted by the federal antitrust statute.[8]

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[8] Generally, government agencies have subpoena power which is limited by statute. *E.g.* 15 U.S.C. § 1312 (authorizing subpoenas for documentary

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The next case considered by the Second Circuit, *United States* v. *Davis*, 702 F.2d 418 (2 Cir. 1983), *cert. denied sub nom., Veliotis* v. *United States*, 463 U.S. 1215, 103 S.Ct. 3554, 77 L.Ed.2d 1400 (1983), involved a grand jury subpoena of documents produced in discovery during pending civil litigation which were protected by an informal understanding that the documents were confidential. The parties never reduced this understanding to writing or made it the subject of a protective order. 702 F.2d at 422. In that case, the court concluded that the interest in law enforcement evidenced by a grand jury subpoena outweighed the interest in confidentiality in civil litigation expressed in a purely informal agreement. *Id.* By contrast, the deponents' interest in confidentiality in the case before us was made the subject of a written protective order on which the deponents' were intended to rely.

Most recently, in *Palmieri* v. *New York*, 779 F.2d 861 (2 Cir. 1985), the court considered a motion by the government to intervene in a civil antitrust action to modify two protective orders to allow the state Attorney General and a grand jury to have access to a confidential settlement agreement and to hear evidence regarding this agreement. The court held that, absent a finding of improvidence in the magistrate's grant of the protective orders, or of extraordinary circumstances or compelling need for the protected information, the district court could not modify the protective order to allow such access to the confidential documents. Procedurally, *Palmieri* differs from our case, because *Palmieri* involved a motion for intervention to modify a protective order. However, the procedure used to avoid the proscription of a protective order should not alter the substantive balancing of interests which must be conducted. In *Palmieri*, the court concluded that the interest in ensuring

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material or information "relevant to a civil antitrust investigation"). By contrast, process issued by a grand jury can be virtually unlimited, without a requirement of showing relevance or materiality as a condition of enforcement. *United States* v. *Dionisio*, 410 U.S. 1, 9-13, 93 S.Ct. 764, 769-771, 35 L.Ed.2d 67 (1972).

efficient resolution of civil disputes expressed in Rule 26 outweighed the interest of law enforcement, including a grand jury investigation, absent a showing of compelling need for the demanded materials. While *Palmieri* might be distinguished from our case because the interest in facilitating resolution of private disputes has traditionally kept settlement agreements from the public eye, the principles in *Palmieri* which supported the authority of a civil protective order would still militate in favor of upholding the protective order here in the face of the grand jury's subpoena.[9] As a result, the *Palmieri* decision is difficult to reconcile with the Second Circuit's earlier decision in *GAF Corporation*, which favored the interests of law enforcement in analogous circumstances.

IV.

With these principles in mind and the light shed on them by the Second Circuit, we conclude that the balance in this case must be struck in favor of the grand jury's need to gather evidence. Balancing of the competing interests in this case favors enforcement of the grand jury's subpoena. A grand jury, subject only to the limitations of a fifth amendment, has the right to all relevant evidence. A protective order, while a significant impediment to a grand jury investigation, cannot effectively deal in all instances with the problems posed by civil litigants and witnesses who plead the

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[9] We mention one final case from within our circuit because it deals directly with the issue presented here. Judge Merhige, in an unpublished opinion, *United States* v. *Doe*, Civ. No. 79-0073-A-R (Slip Op.) (E.D. Va. March 28, 1980), considered a motion by a group of deponents to quash a grand jury subpoena which requested documents and deposition transcripts sealed under a protective order. Judge Merhige denied the motion, reasoning that "the policy of having possible criminal activity that may have occurred in connection with the civil litigation investigated by a grand jury far more benefits the general public than the need to encourage witnesses and parties to be more cooperative in civil litigation." Judge Merhige concluded: "This Court will not sit idly by and permit its civil processes and orders to be utilized as a shield against either a valid investigation or prosecution of those who may have violated the criminal laws of the United States during the course of civil litigation. To do otherwise would be to suggest that perjury as an example could be committed under such circumstances with impunity."

fifth amendment during pretrial discovery. It is not therefore a substitute for invocation of the privilege, and it should not be afforded that status.

A civil protective order may seriously impede a criminal investigation by a grand jury. Uncoerced testimony given in a civil action may provide important and relevant information to grand jury investigation.[10] In addition, the government has interest in obtaining this information for purposes of impeachment should the deponents testify in a manner materially inconsistent with their deposition testimony in any future criminal trial. Finally, protective orders may cause the absurd result of shielding deponents from prosecutions for perjury because, while evidence of perjury would certainly be cause for modifying a protective order, the protective order itself impedes an investigation that might lead to cause for believing that perjury has occurred.[11]

In addition, a protective order issued by a civil court for the purpose of protecting a deponent's fifth amendment privilege if given paramount effect would usurp the proper authority of the executive branch to balance the public interest in confidentiality against the interest in effective criminal investigation. For this reason, the power to apply to a court for a grant of immunity is limited to the United States Attorney under federal law. 18 U.S.C. §6003; *Pillsbury* v. *Conboy, supra.* A trial court has no authority to grant immunity to a witness on its own motion. *United States* v. *Klauber*, 611 F.2d 512, 817, 517 (4 Cir. 1979), *cert. denied*, 446 U.S. 908, 100 S.Ct. 1835, 64 L.Ed.2d 261 (1980). The Supreme Court has upheld the constitutionality of the provisions of the federal immunity statute authorizing judicial oversight of grants of immunity only because a court's duty

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[10] It is misguided to contend that the government's ability to gather other evidence of criminal misconduct undermines this interest. The grand jury has the right to gather all relevant evidence.

[11] Sealing the discovery process in civil proceedings also sacrifices the traditional interest of the public in obtaining access to civil proceedings. *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 31, 104 S.Ct. 2199, 2206, 81 L.Ed.2d 17 (1984) (public interest in civil process requires party seeking protective order to show good cause for entry of this order); *Cipollone* v. *Liggett Group, Inc.*, 785 F.2d 1108, 11821 (3 Cir. 1986).

under the statute is limited to ascertaining whether the government has complied with the technical requirements for a grant of immunity. *Ullmann* v. *United States*, 350 U.S. 422, 434, 76 S.Ct. 497, 504, 100 L.Ed. 511 (1956). *See Kastigar* v. *United States*, 406 U.S. 441, 448, 92 S.Ct. 1653, 1658, 32 L.Ed.2d 212 (1972) (reaffirming *Ullmann*).

These limitations on judicial power thus counsel against authorizing district courts to give civil deponents *de facto* grants of immunity in the guise of Rule 26 protective orders.[12] The deponents here, in seeking a civil order on which they could rely to protect their privilege against self-incrimination, desired such a *de facto* grant of immunity. This circuit has properly refrained from allowing such judicial intervention into executive prerogatives.

> The public suffers when a criminal is not prosecuted, and this detriment must be weighed carefully against the public benefit that will accrue from the information which immunity can compel. The balancing of these interests has not been left to persons unanswerable to the public.

In Re Kilgo, 484 F.2d 1215, 1222 (4 Cir. 1973). *Accord United States* v. *Klauber*, 611 F.2d at 520.

Another consideration is that while a protective order, if given full effect, would impede the investigating function of a grand jury, it is not totally effective in furthering the civil court's interest in facilitating discovery. Of course, a protective order may encourage deponents to provide relevant evidence because the order reduces the risk that incriminating information will be brought to the attention of law enforcement officials. However, an individual may not totally rely on judicial protection against the use of incriminating information without a grant of immunity. 8 Wright & Miller, Federal Practice & Procedure at § 2018 ("whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful"). Even with a protective order in place, incriminating statements still

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[12] Separation of powers principles also counsel courts against intervening in a criminal investigation being conducted by a grand jury. *Reporters Committee* v. *AT&T*, 593 F.2d 1030, 1065 (D.C. Cir. 1978).

create the risk that parties to a civil action will leak sealed information or materials to relevant law enforcement authorities. In the event of a leak of information to law enforcement authorities, a protective order, unlike a grant of immunity, provides no assurance that incriminating statements will not be used against a deponent in a criminal proceeding or that the statements will not be used to obtain other relevant evidence. Moreover, a protective order, such as the order in this case, is normally subject to modification under Rule 26 for sufficient cause.

In addition, a protective order cannot serve as more than a stopgap measure to seal discovery materials. Incriminating information will normally be disclosed at trial even if the information is effectively suppressed prior to that time. The temporary benefit of pretrial secrecy will not appeal to many individuals as a substitute for formal immunity or cause them to cooperate with civil discovery motions by waiving their fifth amendment privilege. In addition, as we have previously shown, a protective order does not alter an individual's right to assert his fifth amendment privilege. Finally, to the extent that protective orders shield deponents from the risk of investigations into possible perjury, it is questionable whether such orders serve the interest of fair resolution of civil disputes.

Apart from a protective order, a civil court has available other tools to ensure successful resolution of a civil action which is threatened by a deponent's privileged silence. *See generally* Heidt, The Conjurer's Circle, *supra*, at 1107-32. One commonly used alternative to allay the fears of a deponent is to delay discovery until a pending grand jury investigation has been completed. *See Shaffer* v. *United States*, 528 F.2d 920, 922 (4 Cir. 1975) (stating a preference for stays in such cases). Such a stay, which was denied by the Virginia district court in this case, has the salutary effect of minimizing the conflict between criminal investigations and fair discovery in civil litigation. In addition, in a few cases, a pretrial hearing by the district court into the validity of a claim of self-incrimination may expose fanciful or frivolous assertions of the privilege. *See Bathalter*, 705 F.2d at 927.

At trial, the trier of fact may also use the silence of a deponent for relevant inferences that it creates. *Lefkowitz*, 431 U.S. at 808 n. 5, 97 S.Ct. at 2137 n. 5 (constitutionally protected silence may be considered for its probative value in a civil case). *See also Palmigiano, supra; United States* v. *White*, 589 F.2d 1283, 1286 (5 Cir. 1979).[13]

In some cases, invocation of the privilege by a party may justify shifting the burden of proof in a civil action in accordance with the doctrine that the burden of proof should be placed on the party who is in the best position to provide relevant proof. *See United States* v. *New York, New Haven & Hartford Railroad Company*, 355 U.S. 253, 256 n. 5, 78 S.Ct. 212, 214 n. 5, 2 L.Ed.2d 247 (1957); *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 111, 62 S.Ct. 156, 161, 86 L.Ed. 89 (1941). *E.g., Ybarra* v. *Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944). The trial court should consider such action only when invocation of the privilege appears to have contributed substantially to a party's failure of proof. But, in some cases, use of the traditional rules of burden-shifting may allow civil litigation to proceed in the face of silence during discovery.

Finally, to avoid invocation of the privilege aimed at thwarting discovery, testimony waiving the privilege against incrimination during trial might be excluded where the privilege was asserted in response to questions during discovery. *E.g. SEC* v. *American Beryllum & Oil Corp.*, 303 F. Supp. 912, 921 (D.C.N.Y. 1969) (barring introduction of documents into evidence when party failed to produce documents during discovery based on an assertion of fifth amendment privilege). Exclusion, like a protective order, would be justified under Rule 26 which authorizes a court to issue such orders as may be needed to protect a party from oppression.

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[13] In deciding whether to admit a deponent's silence as relevant evidence of a material fact, a trial judge, of course, has discretion to consider unfair prejudice to a party who risks losing a civil judgment or giving incriminating testimony that may result from admission of such evidence. F.R. Ev. 403.

In summary, a district court has alternatives available to encourage parties to comply with the goal of liberal discovery short of entry of a protective order. Where discovery is nonetheless impeded by a genuine fear of future prosecution, these alternatives also provide tools for resolution of private disputes in the face of pretrial silence. In cases such as this one, where deponents to a civil action are not parties to the suit, these devices will not burden the exercise of the constitutional riqht to silence. In other cases involving deponents who are parties to an action, these alternatives may burden a parties' decision to maintain silence due to the risk of self-incrimination, but such burden in the civil context, where equitable under the circumstances, does not implicate values with which the fifth amendment is concerned.

V.

In our view, a reasonable balancing of the respective interests of the civil courts and grand jury investigations favors enforcement of a grand jury subpoena despite the existence of an otherwise valid protective order. Deponents suggest, however, that the *per se* rule favoring enforcement of a grand jury subpoena which we adopt is unwarranted. They suggest that a case-by-case approach of balancing these competing interests would be appropriate, with the right on the part of the government to seek modification of a protective order upon a showing of compelling need under Rule 26. The deponents find some support for this contention in the *Palmieri* case. *Supra.*

Only rarely could ad hoc balancing of the interests at stake here be effectively performed at the time of original entry of the protective order. A civil court may issue a protective order under Rule 26(c) upon the motion of a party to the litigation. A desire to protect commercial information or trade secrets may motivate a request for a protective order. In most cases, a court would be left to balance the needs of law enforcement against the concerns of the parties without government officials being present to state their interests in the matter. In the Virginia litigation in this case, the court did not even consult with the United States attorney before

entering a protective order and, not unexpectedly, the parties to the Virginia litigation all favored issuance of a protective order. It is not surprising, therefore, that issuance of protective orders in civil litigation has become almost routine.[14] This trend cannot result in an effective balancing of the interests which are at stake in this case.

If, however, courts are capable of fairly examining the disparate interests of law enforcement and of the civil courts in individual cases, the adoption of a case-by-case approach of judicial review of protective orders or orders denying modification of protective orders will still have the effect of undermining both of these interests. The adoption of a compelling need test for disclosure of sealed discovery materials would deprive federal grand juries of relevant evidence in some cases. Despite the availability of protective orders, however, parties with self-incrimination concerns would still have the option of resisting discovery requests by asserting their fifth amendment privilege. *Pillsbury* v. *Conboy, supra.* Uncertainty about the ultimate outcome of a protective order will mean that no deponent may always effectively rely on a protective order to secure his right against self-incrimination. Only an absolute, unmodifiable protective order could thus hope to provide the civil courts with a tool to entice deponents to forsake their right to assert a fifth amendment privilege.[15]

Most importantly, even if the courts were in a position to balance correctly the needs of criminal investigations and the fifth amendment concerns of persons involved in civil

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[14] *See* Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 218 (1983); *United States* v. *Doe, supra.*

[15] Note, Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions, 98 Harv. L. Rev. 1023, 1037-38 (1985) ("Uncertainty about the likelihood of modification can be great because courts use an unpredictable balancing test to decide whether to modify orders. . . . Without formal immunity, an accused would be reluctant, and perhaps foolish, to submit to discovery"); Note, Nonparty Access to Discovery Materials in the Federal Courts, 94 Harv. L. Rev. 1085, 1104 (1981) ("The argument that a deponent will not invoke his privilege if the deposition is governed by a Rule 26(c) protective order is surely fallacious").

litigation, the courts lack the constitutional authority to engage in such an exercise. *Supra.* As we have stated, the balancing of the interests of law enforcement against other needs is properly for the executive department. It, alone, has the right to determine whether to immunize a witness. *United States* v. *Klauber, supra; In Re Kilgo, supra.*

It should be noted also that a rule permitting a protective order to prevail over a grand jury subpoena in some instances could easily become a tool for delaying criminal investigations. Parties who are the subject of a grand jury investigation and who are involved in civil litigation would, of course, often seek protective orders in such instances. The government would undoubtedly choose to intervene in civil actions to obtain this relevant evidence.

Even if the government ultimately prevailed, this additional litigation would delay the grand jury investigation, and possibly for no purpose, because unsealing protected materials might only reveal that the deponents asserted their fifth amendment privilege during discovery despite the existence of the protective order.[16]

For these reasons, we affirm the district court's judgment denying the motion to quash. We hold that the existence of an otherwise valid protective order was not sufficient grounds to quash the subpoena duces tecum issued by the Maryland grand jury.

AFFIRMED.

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[16] For example, at the conclusion of the litigation in the *Martindell* case, *supra*, the record indicated that the deponents in that case had invoked the privilege during depositions although they vigorously litigated the authority of the protective order to bar government access to the deposition transcripts. *See* Note, Nonparty Access to Discovery Materials, *supra*, at 1104.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent. Chief Judge Winter for the majority has written fairly and comprehensively of the conflicting public interests underlying the issues in this appeal. I disagree, however, with the majority's resolution of the conflict.

I.

In my view, the principal issue is the same as that presented in *Palmieri* v. *State of New York*, where the Second Circuit observed that "his case lies at the juncture of two competing imperatives in our judicial system: the need of a . . . grand jury to gather evidence for ongoing criminal investigations, and the need of our district courts and civil litigants to facilitate efficient resolution of disputes . . ." 779 F.2d 861, 864 (2 Cir. 1985). *Palmieri* upheld a protective order against a government attack because, among other reasons, litigants in our civil justice system must be able to rely on assurances of confidentiality given by trial judges.[1] The Second Circuit's longstanding emphasis on the importance to civil discovery of upholding protective orders reflects my views.

> [T]he vital function of a protective order issued under Rule 26(c), F.R. Civ. P. . . . is 'to secure the just, speedy and inexpensive determination' of civil disputes, Rule 1, F.R. Civ. P., by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice. Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.
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[1] The potentially self-incriminating deposition testimony at issue here makes this a stronger case for denying the government access than presented in *Palmieri*. In that case, the grand jury issued a subpoena ad testificandum and the government sought a modification of the protective order to require Palmieri to testify concerning a protected settlement agreement and to gain access to the settlement negotiations and terms.

> [A]bsent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and . . . such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation. . . .

Martindell v. *International Telephone & Telegraph*, 594 F.2d 291, 295, 296 (2d Cir. 1979); *see also Palmieri*, 779 F.2d at 864865 (and cases cited therein).

The deponents here would not have provided the deposition testimony but for their reliance on the district court's statement that the testimony would be beyond the government's reach. In balancing the grand jury interest against the interest in supporting the integrity of a judicial guarantee and the purposes promoted by Rule 26, I am not persuaded that the grand jury interest here establishes a compelling need to breach the protective order.

The majority eschews discrete balancing of competing interests and creates a per se rule overriding Rule 26(c) protective orders when opposed by grand jury subpoenas. It reaches this result by balancing abstract concepts rather than the facts of each case. In the process I feel it has swept away a long-standing tool for the management of civil litigation. Litigants relying on protective orders offer a significant amount of evidence in civil cases, but our ruling today will squelch the desire of future deponents to give evidence under a protective order. No longer will deponents be able to rely on the power of a United States District Court to limit disclosure of their testimony to third parties. The government will become a new player in the civil discovery process, forcing deponents to invoke the fifth amendment and thus retarding effective and informative discovery.

II.

While agreeing generally with what the majority has written concerning the invocation of the fifth amendment privilege, I nevertheless feel that the outcome it reaches permits an end run by the government around these deponents'

privileges against self-incrimination. The deponents possessed information that would help resolve civil litigation but refrained from disclosing it because of their apprehension that it would be transmitted to the grand jury. They testified only in reliance on the district court's pledge to protect their potentially self-incriminating remarks from the grand jury.

The grand jury has awesome investigatory powers and, as the majority correctly notes, it operates on the principal that the public has a right to everyman's evidence. *Branzburg* v. *Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972). Rather than counterbalancing the use of protective orders as suggested by the majority, however, the great reservoir of power reposed in the grand jury represents an additional reason for enforcing such orders.[2]

Here, without calling the deponents to appear, the grand jury will obtain evidence given in express contemplation of protection from that body. The government receives evidence it would not have obtained but for overriding a protective order that spawned the deposition in question. The deponents in agreeing to the protective order waived fifth amendment rights in reliance on the order of a district court, and now face the possibility of criminal action based on evidence the grand jury otherwise could not have obtained without their having been immunized.

In the majority view, the enforcement of a protective order against a grand jury subpoena for evidence would constitute a judicial grant of immunity. I agree that granting immunity from prosecution in exchange for testimony is the exclusive prerogative of the executive branch.[3] Protective

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[2] As the Seventh Circuit has observed, "the explicit grant of such extensive investigative powers should be construed to preclude the implication of supplemental powers, absent unusual circumstances." *Wilk* v. *American Medical Association*, 635 F.2d 1295, 1300 (7th Cir. 1980); *see also H.L. Hayden Co.* v. *Siemens Medical Systems*, 106 F.R.D. 551, 556 (S.D.N.Y. 1985), aff'd, 797 F.2d 85 (2d Cir. 1986).

[3] The majority is concerned that enforcement of a protective order to preclude a grand jury's access to the protected materials would constitute

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orders, however, are limited judicial devices to foster quick and productive discovery. Testimony given under Rule 26(c) is isolated and apart from a criminal investigation and does not alter the deponent's potential culpability. Rule 26 does not usurp powers of the grand jury and prosecutor, but instead reflects the authority of a trial judge to manage discovery and control access to judicial records. *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 36, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984).

The majority's argument that a protective order "may seriously impede a criminal investigation by a grand jury" both overstates the reach of the Rule 26(c) shield and understates the retained power of the grand jury. Rule 26(c) provides only limited protection for evidence that, here, would not exist but for the protective order itself. Unlike a grant of immunity, a protective order has no effect on the continued conduct of the grand jury's investigation. The government remains free to call the deponents before the grand jury to explore their fifth amendment claims and to prosecute or grant immunity. If the deponents are

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unseemly "judicial intervention into executive prerogatives." To the contrary, there is no interference with executive processes when a judge enters a protective order prior to any indication that a grand jury may desire to review the protected materials. Likewise, the universe of information to which the fifth amendment privilege could potentially attach may not be, or may never be, the subject of a grand jury investigation. The majority's separation of powers logic, moreover, encourages prosecutorial intrusion into the judicial domain by validating the use of a subpoena duces tecum as a per se enforceable discovery device. What prosecutor will now invoke the less intrusive process of seeking modification of a protective order from the issuing judge when he knows he has virtually unreviewable authority to override the judge's order simply by sheilding himself in the cloak of the grand jury's "broad investigative function?" Not only does the subpoena pit the executive against the judicial, but it may result, as it did in this case, in conflict within the judicial branch. For enforcement, the prosecutor must appear before one district judge and ask him to override the issuing judge's order. Here, Judge Hargrove effectively "reversed" the decision of Judge Hilton. In contrast, seeking modification from the issuing judge and appealing, if necessary, an adverse decision, would conform with common trial and appellate practice, and avoids the friction inherent in the subpoena procedure. *See United States* v. *GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979).

immunized, the grand jury can then demand the sought-after evidence and the balance would tilt conclusively towards enforcing a subpoena for previous deposition testimony.

Another reason that protective orders fall short of a grant of immunity is that they can be modified. Perjury committed by deponents under Rule 26(c) protection, for example, would obviously justify modifying the protective order to permit enforcement of a subpoena for depositions given under it. The potential for modification of a protective order or overriding it through a subpoena thus belies fears of harming grand jury investigations. Here, Judge Hilton expressly provided that his order was subject to modification.

III.

The majority argues that Rule 26(c) is ineffective and should be supplanted by other methods of eliciting evidence from recalcitrant witnesses. I disagree. The vitality of the protective order has made it a valuable method of facilitating discovery.

Placing higher burdens of proof upon those who invoke the fifth amendment in civil litigation could well retard the truth-seeking function of civil discovery, and it unnecessarily penalizes the exercise of a constitutional right. Nor are stays of discovery during a grand jury investigation and court inquiries into the validity of fifth amendment claims adequate substitutes for Rule 26(c) protective orders. While these are both useful trial management techniques, they can not replace the longstanding role played by Rule 26(c). In my view, Judge Hilton was well within appropriate discretion in rejecting the deponents' motion for a stay because of the pressing need for the depositions in question. *See D'Ippolito* v. *American Oil Co.*, 272 F. Supp. 310, 312 (S.D.N.Y. 1967). I also disagree that possible leaks of confidences covered by a protective order and the potential for disclosure of information at trial warrant the per se rule announced by the majority. Those factors form valid tactical concerns for parties considering protective orders during discovery, but the very purpose of Rule 26(c) is to foster

wide-ranging, successful discovery that will often forestall a public trial.

In sum, I feel that Rule 26(c) has worked long and quietly to effect the efficient and just management of civil discovery. The emasculation of protective orders by today's decision replaces the rule with a new presence in civil litigation—the roving eye of government and the attendant rush by affected civil litigants to invoke the fifth amendment in discovery.

APPENDIX B

In re GRAND JURY SUBPOENAS DUCES TECUM SPECIAL GRAND JURY, SEPTEMBER, 1986 TERM.

Civ. A. Nos. HAR 87-99, HAR 87-100 and HAR 87-410.

UNITED STATES DISTRICT COURT,
D. MARYLAND.

April 21, 1987.

Eugene M. Propper, Dwight D. Meier, Lane & Edson, P.C., Anne D. Smith, Christopher M. Curran, White & Case, Washington, D.C., Vincent Ferretti, Jr., Rockville, Md., John R. Fornaciari, Steele, Simmons & Fornaciari and Mark H. Touhey, III, Pierson, Ball & Dowd, Washington, D.C., for movants.

Breckinridge L. Willcox, U.S. Atty., Barbara S. Sale and Joyce McKee, Asst. U.S. Attys., Baltimore, Md., for U.S.

MEMORANDUM OPINION

HARGROVE, District Judge:

These cases raise a somewhat novel issue in this Circuit: whether the Court can quash the grand jury's subpoena *duces tecum* when the information sought is subject to a protective order in a civil case. The parties have submitted memoranda on the issues, and an oral argument was conducted on March 20, 1987.

BACKGROUND

The motions seek to quash several subpoenas *duces tecum* that were issued by a special grand jury[1] sitting in this

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[1] As part of the Organized Crime Control Act of 1970, Congress authorized the impanelment of special grand juries. 18 U.S.C. §§3331-3334. A special grand jury has no special powers different from a regular grand jury; it is simply another grand jury sitting in the district. Its duties are "to inquire into offenses against the criminal laws of the United States alleged to have been committed" within the district. *See, e.g., United States* v. *Koliboski*, 732 F.2d 1328 (7th Cir. 1984) (special

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district. Fed. R. Crim. P. 17(c). These subpoenas command a lawyer to appear before the grand jury and bring with him the depositions of several persons involved in multi-district civil litigation pending in the Eastern District of Virginia. The deponents ("movants") have moved to quash the subpoenas on the grounds that these depositions are subject to a protective order issued by the judge presiding over the civil matter in Virginia.[2]

The protective order came about in the following manner. The movants, who were not parties in the Virginia litigation, were subpoenaed to testify with regard to that case. They were aware that a grand jury had convened in Maryland to investigate aspects of the same issues as were presented in the civil case and the movants were concerned with their fifth amendment privilege against self-incrimination. They sought to defer the civil depositions until the conclusion of the grand jury investigation. After two hearings, the Virginia judge denied a stay but said that he would enter a protective order to deal with the deponents' concerns about their fifth amendment rights.

The protective order strictly limits access to the depositions to persons who are involved in the civil litigation and the order states, "the sealed depositions and the information contained therein shall not be made available to any state or federal investigating agency or authority, and shall not be used in connection with any proceedings other than these actions, except by further order of this Court. . . ."[3]

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grand jury did not exceed its authority when it indicted defendant for failure to file income tax returns).

[2] The United States Attorney's Office agreed to extend the subpoena date until after this Court ruled on the Motion to Quash.

[3] After hearing oral argument in this matter, the Court sent the parties back to the Virginia judge to clarify whether his Protective Order was designed to preclude the grand jury from obtaining the depositions. *See Flavorland Industries, Inc.* v. *United States*, 591 F.2d 524 (9th Cir. 1979). Obviously, if his order did not extend to grand jury subpoenas, there would be no issue for this Court to decide. At a hearing before the Virginia judge, he stated "there isn't any question that when I entered this

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The movants relied on this protective order and participated in the depositions.[4] The government was not involved in the Virginia litigation, and thus was not heard on the issue of whether a protective order should issue.

DISCUSSION

At the outset, it is worth noting that this Court has consistently seen its role in this dispute narrowly. The only question presented is whether the Virginia court's Protective Order can be the basis on which to quash the grand jury subpoena.

The movants have characterized the subpoena *duces tecum* as an attempt to modify the protective order, and they insist that this Court is not the proper forum in which to examine the merits of whether a protective order should have been issued in the Virginia litigation. They assert that the Virginia court is the only one with jurisdiction to vacate or modify that order. The Court agrees that it should not examine the merits of the protective order, but, nevertheless, the Court is faced with the question regarding the enforceability rather than the providence of the protective order. These are distinct issues.

There can be little question that the motion to quash the grand jury subpoena is properly before this Court. In *Martindell* v. *International Telephone and Telegraph Corp.*,

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protective order I intended it to apply to the grand jury as well as any other investigative person or body of the state or federal government." Transcript of 3/27/87 Hearing, p. 8.

[4] The Government argues that it is unclear that the movants in fact relied on the protective order: "one claims to have relied on the written order, one claims to have relied on the understanding that an order would be entered, and two evidently sought some sort of nuncprotunc coverage after the first round of subpoenas were issued, notwithstanding the fact that they were not named in the original order."

The Court assumes that there was reliance on the order because it does not affect the Court's analysis below. *But cf. United States* v. *Davis*, 702 F.2d 418, 422 (2d Cir.), *cert. denied*, 463 U.S. 1215, 103 S. Ct. 3554, 77 L.Ed.2d 1400 (1983) (the assertion by the defendant that he relied on an "understanding of confidentiality" was evaluated by the court but rejected).

594 F.2d 291, 294 (2d Cir. 1979), where the Government was attempting to challenge a court order restricting access to depositions, the Second Circuit indicated that the Government has two ways of proceeding. The first is to subpoena the deposition transcripts, in which case the issue could be raised by motion to quash or modify the subpoena. The second is to seek permissive intervention in the private action pursuant to Rule 24(b) of the Federal Rules of Civil Procedure and ask the issuing court to vacate or modify the protective order. In the instant dispute, the Government has chosen the first course.

The Court now turns its attention to the merits of the arguments presented. Grand jury subpoenas are governed by Rule 17(c) of the Federal Rules of Criminal Procedure which provides that a court may quash or modify any subpoena *duces tecum* if compliance therewith would be unreasonable or oppressive.

The fifth amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." The Supreme Court has interpreted broadly the power of the grand jury.

> Because its task is to inquire into the existence of possible criminal conduct and the return only well-founded indictment, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety of forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."

Branzburg v. *Hayes*, 408 U.S. 665, 688, 92 S.Ct. 2646, 2660, 33 L.Ed.2d 626 (1972) (*quoting Blair* v. *United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979). *See also United States* v. *Sells Engineering, Inc.*, 463 U.S 418, 423-24, 103 S.Ct. 3133, 3137-38, 77 L.Ed.2d 743 (1983).

It is a well-settled principle of law that the court supervises the conduct of the grand jury. *See, e.g., Blair*, 250 U.S. at 282, 39 S.Ct. at 471 (1919) (A court is "entitled to set limits to the investigation that the grand jury may conduct");

Brown v. *United States*, 359 U.S. 41, 49, 79 S.Ct. 539, 546, 3 L.Ed.2d 609 (1959) ("A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses"); *Branzburg*, 408 U.S. 708, 92 S.Ct. at 2670 (1972) ("Grand juries are subject to judicial control and subpoenas to motions to quash").

Even though the court has the power to oversee the grand jury's conduct, the court should not intervene in the grand jury process absent some compelling reason. *United States* v. *Dionisio*, 410 U.S. 1, 16-18, 93 S.Ct. 764, 772-73, 35 L.Ed.2d 67 (1973); *In Re Grand Jury Subpoenas, April, 1978 (Harvey)*, 581 F.2d 1103, 1108 (4th Cir. 1978), *cert. denied sub nom., Fairchild Industries, Inc.* v. *Harvey*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979). The grand jury is entitled to "every man's evidence" unless the person has a constitutional, statutory, or common law privilege. *Branzburg*, 408 U.S. at 688, 92 S.Ct. at 2660.

In *United States* v. *United States District Court*, 238 F.2d 713 (4th Cir. 1956), *cert. denied sub nom., Valley Bell Dairy Co.* v. *United States*, 352 U.S. 981, 77 S.Ct. 382, 1 L.Ed.2d 365 (1957), three of the most well-regarded judges in the Fourth Circuit, Judges Parker, Soper and Sobeloff, granted a writ of mandamus to a district judge who had interfered with the grand jury's investigation. The discussion in that opinion is particularly applicable thirty years later to the instant case:

> [W]e think that the United States is upon the undisputed facts unquestionably entitled to the writ. We do not for a moment question the good faith of the learned and able district judge or think that he was actuated by any motives other than a desire to see that justice was properly administered. We think, however, that the action taken by him interfered unduly with the powers of the grand jury and the proper functions of government counsel in the investigation which the grand jury was conducting. In this connection it must be remembered that, while the grand jury is not independent of the court, it is not subject to the court's directions and orders with respect to the exercise of its essential functions. *See Hale* v. *Henkel*, 201 U.S. 43, [26 S.Ct. 370, 50

> L.Ed. 652]; *Blair* v. *United States*, 250 U.S. 273, [39 S.Ct. 468, 63 L.Ed. 979].

238 F.2d at 721.

Throughout their briefs, the movants argue that the Government is trying to make an "end run" around the protective order and obtain information through the grand jury that the Government would not be able to obtain on its own. While the truth of the argument may seem to create an unfair result, to hold that the grand jury could not get information unavailable to the Government would ignore the long-recognized distinction between the two entities.

> "Historically, [the grand jury] has been regarded as a primary security to the innocent against hasty, malicious and oppressive persecution; it served the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."

Branzburg, at 687, n. 23, 92 S.Ct. at 2659 n. 23 *(quoting Wood* v. *Georgia*, 370, U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962)). "The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone* v. *United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960) (footnote omitted).

On many occasions, the Supreme Court has rejected collateral challenges that impede criminal investigations by the grand jury. In the seminal case of *Blair* v. *United States*, 250 U.S. 273, 39 S.Ct. 468, 63 L.Ed. 979 (1919), several subpoenaed witnesses refused to appear before the grand jury on the ground that the law that the grand jury was enforcing was unconstitutional. The Court ordered the witnesses to testify, ruling that "an individual is not entitled to challenge the authority of the grand jury, provided they have a de facto existence and organization." *Id.* at 280, 39 S.Ct. at 470. *See also, e.g., United States* v. *Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1972) (witness may not deny voice exemplars on the ground that it violates fourth and fifth amendment rights); *United States* v. *Calandra*,

414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974) (witness may not refuse to respond to grand jury on the ground that the question or request is derived from a prior search or seizure that violated the fourth amendment).

The main case relied upon by the movants is *Palmieri* v. *State of New York*, 779 F.2d 861 (2d Cir. 1985). In that case, a magistrate who was facilitating settlement negotiations issued a protective order providing that all matters related to discovery and the terms of the settlement would not be disclosed to any other person, including any government agency or instrumentality. In *Palmieri*, the Second Circuit held that the trial court erred by not expressly ascertaining that the state met its burden of proof before the judge modified a protective order in a civil case, thereby releasing evidence to the state grand jury.[5] *Id.* at 864.

To the extent that the *Palmieri* court does not recognize a difference between disclosure to the prosecutor and disclosure to the grand jury, this Court disagrees. Every case relied upon in *Palmieri* recognizes that there is a difference between turning evidence over to the government and turning it over to the grand jury. In *Martindell, supra*, there was no pending grand jury investigation, and the court neither was presented with nor did it decide that issue. *See* 594 F.2d at 296 n. 6, and Medina, J., concurring, 594 F.2d at 298. In *United States* v. *Davis*, 702 F.2d 418, (2d Cir.) *cert. denied*, 463 U.S. 1215, 103 S.Ct. 3554, 77 L.Ed.2d 1400 (1983), one of the facts by which the court distinguished *Martindell* was that in *Davis* the government was proceeding by way of grand jury. *Id.* at 421-22. In *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), Judge Frankel held that the Antitrust Division of the Department of Justice, as part of an investigation, could not obtain confidential civil discovery in a case to which the Government was not a party. In support of its holding, the court recognized that the federal government had the powers of the grand jury and the civil investigative demand at its

[5] An interesting question not discussed by the parties is whether the New York State grand jury powers are as extensive as the federal grand jury's. For the purposes of this motion, the Court assumes they are.

disposal to get this information, and the court would not supplement those powers. *Id.* at 132.

Judge Wisdom discussed the *Martindell* and *Eastman Kodak* decisions when he sat by designation with the Seventh Circuit in *Wilk* v. *American Medical Association*, 635 F.2d 1295 (7th Cir. 1980):

> These cases are distinguishable in that the party seeking access in them was the federal government, which in each case had at its disposal special investigatory powers not available to private litigants. Thus, the government could have employed a grand jury in aid of its perjury investigation in *Martindell*, and since the antitrust investigation it conducted in *Eastman Kodak* could have led to criminal or civil proceedings, it might have used either a grand jury or the special "civil investigative demand" created by 15 U.S.C. 1312. As the opinions in both cases suggest, the explicit grant of such extensive investigatory powers should be construed to preclude the implication of supplemental powers, absent unusual circumstances. When the investigator is the government, there is also a unique danger of oppression. This case involves neither circumstance.

Id. at 1300 (footnotes omitted).

In this Circuit, there is authority that indicates that the grand jury can obtain information that is subject to a protective order. In *United States* v. *Foley*, 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043, 100 S.Ct. 727, 62 L.Ed.2d 428 (1980), the Fourth Circuit was faced with a letter that was obtained by the Government in violation of a civil protective order. The letter was covered by a grand jury subpoena, but was not produced at that stage. In its discussion, the Court said, "[t]he letter was subject to a subpoena and should have been produced during the grand jury investigation." *Id.* at 1337. Implicitly, the Court was saying that something that was inaccessible to the government was available to the grand jury.

In *United States* v. *Doe*, Crim. No. 79-00073-A-R, slip op. (E.D. Va. Mar. 28, 1980), Judge Merhige was presented with a factual scenario very similar to the one presented here. Judge Merhige had issued a protective order in a civil matter. Subsequently, one of the plaintiff's lawyer was served with two grand jury subpoenas *duces tecum* requiring

him to produce documents and deposition transcripts that were covered by the protective order. The grand jury was sitting in the same district as the civil litigation, and so Judge Merhige was also assigned the motion to quash. The court described the issue as follows: "[W]hether by virtue of the protective orders entered in this private civil litigation, the grand jury is precluded from securing existing documents and deposition transcripts which it deems appropriate to fulfill its investigatory function, coupled with the issue of privilege, either attorney-client or work product." Slip op. at 5.

In *Doe*, the court denied the motion to quash. The court held that crimes might have been committed during the course of discovery, and that the grand jury's need for this information outweighed the need for witnesses and parties to be more cooperative in civil litigation. The court said,

> Undoubtedly certain of the third parties, and indeed the parties themselves, may have been more cooperative and more comfortable under the umbrella of the protective order, yet, the Court never intended nor contemplated that the protective order might be construed as an inducement to a party to forego constitutional rights, nor did the court envision the order as a protective device against prosecution for criminal activities.

Slip op. at 7. While that case dealt with crimes committed during the protected discovery, the reasoning of Judge Merhige's opinion is persuasive to this Court.[6]

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[6] In this case, the government asserts that if the protective order is permitted to stand, the effect would be to shield the deponents from prosecution for perjury because the grand jury could never gain access to the statements. This *in terrorem* argument is not farfetched, and one which Judge Merhige expressly recognized in the *Doe* opinion. Slip op. at 8.

Several additional worms might escape from the can if the movants succeed. Can a person who becomes a defendant in a criminal case who was privy to the sealed deposition in the civil case use that deposition in the criminal case to cross examine a witness? If the defendant calls a witness who was deposed in the civil case, does the defendant have to produce the deposition under "reverse Jencks." Fed. R. Crim. P. 26.2.

These potential problems are but a few of those that can arise if a protective order can be enforced against the grand jury. *See* R. Heidt, *The*

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The movants apparently argue that they were lulled into giving deposition testimony due to the protective order that they otherwise would not have given because of their fifth amendment right not to incriminate themselves.[7] Put another way, the court gave them assurances that their testimony would not be used against them in a criminal setting.

The problem with enforcing this aspect of the protective order is that the court has no power to grant immunity to a witness. The United States Attorney has *sole* authority to request that immunity be given to a witness. 18 U.S.C. §§6002 and 6003. *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973); *Pillsbury* v. *Conboy*, 459 U.S. 248, 103 S.Ct. 608, 74 L.Ed.2d 430 (1983) (discussed below). *Accord United States* v. *Hunter*, 672 F.2d 815, 818 (10th Cir. 1982); *In re Daley*, 549 F.2d 469 (7th Cir.), *cert. denied sub nom.*, *Daley* v. *Attorney Registration and Disciplinary Commission of Supreme Court of Illinois*, 434 U.S. 829, 98 S.Ct. 110, 54 L.Ed.2d 89 (1977). The court's duties in entering an immunity order are largely ministerial. *In re Kilgo*, 484 F.2d at 1221. In the Virginia litigation, the court did not even consult with the prosecutor before entering a protective order that had the effect of granting immunity to these witnesses.

> The problems that the privilege against self-incrimination creates in the discovery process may on occasion be avoided by use of protective orders. In some cases it may be appropriate to stay discovery in the civil action until the criminal proceeding is terminated and the risk of incrimination is gone. It has been suggested that a protective order impounding the results of the discovery and forbidding disclosure to anyone other than the parties would removed the risk of incrimination, but whether the court, in a civil action,

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(footnote continued from preceding page)

Conjurer's Circle: The Fifth Amendment Privilege in Civil Cases, 91 Yale L.J. 1062 (1982).

[7] Obviously, the Court has not seen the depositions at issue in this matter, and does not know whether the parties invoked their fifth amendment rights therein. The lawyers may have recognized that the Virginia court could not protect them from the grand jury and advised them to assert their rights. Nevertheless, the Court assumes that the movants testified openly in reliance on the protective order.

> can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome seems doubtful.

8 C. Wright & A. Miller, Federal Practice and Procedure §2018 at p. 153 (footnotes omitted). The analysis underlying the Wright and Miller conclusion is that a person cannot be expected to waive his/her fifth amendment privilege unless the immunity received is coextensive with the right. *Counselman* v. *Hitchcock*, 142 U.S. 547, 12 S.Ct. 195, 35 L.Ed. 1110 (1892); *Kastigar* v. *United States*, 406 U.S. 441, 462, 92 S.Ct. 1653, 1665, 32 L.Ed.2d 212 (1972).

In *Pillsbury* v. *Conboy*, 459 U.S. 248, 26062, 103 S.Ct. 608, 61516, 74 L.Ed.2d 430, the Supreme Court dealt with the exclusive authority of the executive to grant immunity. In that case, Conboy was granted use immunity for his testimony before the grand jury. Later, Conboy was deposed in a civil case. The United States Attorney refused to grant immunity for this deposition testimony. The questions posed at the deposition mirrored the questions answered with immunity before the grand jury. Conboy refused to answer the deposition questions on the ground of his fifth amendment privilege and was held in contempt. The Supreme Court reversed, holding that Conboy had asserted his fifth amendment right properly because the government had not immunized him, and the court could not. The Court stated:

> No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity.

Id. at 261, 103 S.Ct. at 616.

Perhaps in recognition of this problem, the Fourth Circuit has expressed a preference that a court stay civil proceedings when there is a risk of selfincrimination by a party. *Shaffer* v. *United States*, 528 F.2d 920, 922 (4th Cir. 1975). *Accord United States* v. *Kordel*, 397 U.S. 1, 9, 90 S.Ct. 763, 768, 25 L.Ed.2d 1 (1970); *Brock* v. *Tolkow*, 109 F.R.D. 116

(E.D.N.Y. 1985); *Wehling* v. *Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *Dienstag* v. *Bronsen*, 49 F.R.D. 327 (S.D.N.Y. 1970).

The Supreme Court has discussed the implications arising when there are simultaneous civil and criminal proceedings. In *United States* v. *Kordel*, 397 U.S. 1, 90 S.Ct. 763, 25 L.Ed.2d 1 (1970), the Court held that information obtained by the government in a civil proceeding could be used in obtaining a criminal conviction. Subsequent cases have held that it is not unconstitutional to force a litigant to choose between invoking the fifth amendment right in a civil case, thereby risking a loss, or answering the questions, thus risking criminal prosecution. *See e.g.*, *Baxter* v. *Palmignano*, 425 U.S. 308, 31819, 96 S.Ct. 1551, 1558, 47 L.Ed.2d 810 (1976); *United States* v. *White*, 589 F.2d 1283, 128687 (5th Cir. 1979); *Arthurs* v. *Stern*, 560 F.2d 477, 47879 (1st Cir. 1977), *cert. denied*, 434 U.S. 1034, 98 S.Ct. 768, 54 L.Ed.2d 782 (1978); *United States* v. *Rubinson*, 543 F.2d 951, 961 (2d Cir.), *cert. denied sub nom.*, *Chester* v. *United States*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976).

If the movants prevail in their motion to quash, they will have created a situation where they can play both sides of the street—they will be permitted to testify in the Virginia litigation without losing any fifth amendment right. The implications are troublesome, especially when examined with regard to litigants, instead of third-parties, in civil actions. Such a result would be contrary to the general rule that the fifth amendment privilege against self-incrimination is lost if not asserted. *See, e.g., Kordel*, 397 U.S. at 10, 90 S.Ct. at 768; *Garner* v. *United States*, 424 U.S. 648, 96 S.Ct. 1178, 47 L.Ed.2d 370 (1976) (voluntary information supplied in tax return of gambler who did not assert fifth amendment right could be used in criminal prosecution).

In this case, the movants were not parties to the case, and the consequence if they invoked their fifth amendment rights were less serious than if they were parties subject to civil liability. Rule 26(b) of the Federal Rules of Civil Procedure

envisions that privileged information need not be divulged in depositions, and the cases are uniform that a person is justified in refusing to answer a specific question on the ground that it might incriminate him. *See* 8 C. Wright & A. Miller, Federal Practice and Procedure §2018, pp. 140-42.

The grand jury proceedings are secret. Fed.R.Crim.P. 6. Absent a finding of probable cause that a crime has been committed, the secrecy of those depositions will be maintained. The risk of preindictment publicity is not significant. Therefore, the concerns of the Supreme Court in *Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which dealt with Fed.R.Civ.P. 26(c) (the civil analogue to Fed.R.Crim.P. 17(c)) are not present here.

There is a strong public policy not to impede the prompt investigation by the grand jury. The court cannot interfere with the power of the grand jury except in the clearest cases of abuse. *United States* v. *United States District Court*, *supra*, at 722. There has been no allegation of bad faith or improper conduct on the part of the grand jury or the prosecutor that would justify quashing the subpoena.[8]

For these reasons, the Court will not quash the grand jury's subpoena *duces tecum*.

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[8] As mentioned at the outset, this Court believes that the issue before it is very narrow. The movants might be able to claim at a later stage (if they are indicted) that the incriminating statements, if any, were coerced. *See Mid-America's Process Service* v. *Ellison*, 767 F.2d 684 (10th Cir. 1985). This Court expresses no opinion as to the merits of such an argument, but notes that the Fourth Circuit has said that the court should refrain from interfering with the grand jury when "[the] abuse of the grand jury process can be dealt with effectively at another time and in another manner." *In re Grand Jury Subpoenas, April, 1978 at Baltimore (Harvey)*, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied sub nom., Fairchild Industries, Inc.* v. *Harvey*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979).

The possible success of the argument would not have any effect on the validity of the indictment. If an indictment is valid on its face, it is not subject to challenge on the ground that the grand jury acted on the basis of evidence obtained in violation of the defendant's fifth amendment privilege against self-incrimination. *United States* v. *Calandra*, 414 U.S. 338, 345, 94 S.Ct. 613, 618, 38 L.Ed.2d 561 (1974).

APPENDIX C
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5565

In Re: GRAND JURY SUBPOENA

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

VERSUS

(UNDER SEAL),
Defendant-Appellant.

[Filed March 18, 1988]

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC.

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. In a requested poll of the Court, Judges Russell, Widener, Sprouse, and Wilkins voted to rehear the case in banc; and Judges Winter, Hall, Phillips, Murnaghan, Ervin, Chapman, and Wilkinson voted against rehearing the case in banc. As majority of the judges voted to deny rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ADJUDGED AND ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, with the concurrence of Judge Murnaghan and Judge Sprouse.

For the Court,

JOHN M. GREACEN
Clerk

APPENDIX D
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-5565

UNITED STATES OF AMERICA
Plaintiff-Appellee,

VERSUS

(UNDER SEAL)

Defendant-Appellant.

[Filed March 30, 1988]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. JOHN R. HARGROVE, U.S. DISTRICT COURT JUDGE

Upon motion of the appellant, and for cause shown,

IT IS ORDERED that the mandate in this case be, and it is hereby, stayed pending timely application to the Supreme Court of the United States for a writ of certiorari.

Entered at the direction of Chief Judge Winter with the concurrence of Judge Murnaghan and Judge Sprouse.

For the Court,

JOHN H. GREACEN
Clerk

Supreme Court, U.S.
FILED
JUN 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1712

In the Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOES 1-4, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a federal grand jury subpoena may be quashed on the ground that the depositions sought are protected by a Rule 26(c) civil protective order.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1712

JOHN DOES 1-4, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-25a) is reported at 836 F.2d 1468. The opinion of the United States District Court for the District of Maryland (Pet. App. 26a-38a) is reported at 659 F. Supp. 628.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 1988. A petition for rehearing was denied on March 18, 1988 (Pet. App. 39a). The petition for a writ of certiorari was filed on April 18, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 16, 1986, and again on January 21, 1987, a special grand jury investigating the collapse of a Maryland

savings and loan institution issued subpoenas compelling production of depositions given by petitioners in a civil action in the Eastern District of Virginia. Petitioners moved the United States District Court for the District of Maryland to quash the grand jury subpoenas on the ground that their depositions were sealed by a protective order entered in the civil action in Virginia. The motion to quash was denied; the Fourth Circuit affirmed. Pet. App. 1a, 3a. Petitioners now seek review in this Court.

1. Petitioners are former officers and directors of Community Savings & Loan (Community) and its related financial entities, known as the EPIC group. In 1985, Community suffered a financial collapse. Shortly thereafter, civil suits were instituted against EPIC and consolidated in the Eastern District of Virginia. *In re: EPIC Mortgage Insurance Litigation,* M.D.L. No. 680 (E.D. Va.). Plaintiffs in that litigation sought third-party depositions from petitioners (Pet. App. 2a). Petitioners, who knew that a federal grand jury in Maryland was investigating Community and EPIC (*ibid.*), requested a stay of discovery in the civil action, on the ground that their testimony might tend to incriminate them. The district court in Virginia denied the stay, but proposed that a protective order "would satisfy their concerns with the fifth amendment privilege" (*id.* at 9a n.7). In an order negotiated by the parties, the district court in Virginia prohibited disclosure to "any state or federal investigating agency or authority" (*id.* at 3a). No notice of the protective order was given to the government or the United States Attorney conducting the grand jury investigation (*id.* at 17a-18a).

After the depositions were taken, the Maryland grand jury issued subpoenas duces tecum commanding petitioners' attorney to appear and produce transcripts of the depositions in his custody. Petitioners moved to quash, urging that the government was not entitled to the depositions in the absence of a modification of the protective order. At the

request of the Maryland district court, the government sought clarification of the protective order; the Virginia district court confirmed its intention to preclude access to "the grand jury as well as any other investigative person or body of the state or federal government" (Pet. App. 3a-4a, 27a-38a n.3). The government then returned to the Maryland district court, requesting a ruling on petitioners' motion to quash.

2. The Maryland district court denied the motion, distinguishing cases involving an informal government request for materials covered by a protective order (Pet. App. 32a). The court concluded that the grand jury's broad powers to subpoena materials, and its rights to "every man's evidence" cannot be overcome simply because protective orders further "the need for witnesses and parties to be more cooperative in civil litigation" (*id.* at 30a, 34a).

3. A divided panel of the court of appeals affirmed. After emphasizing the "sweeping power of the grand jury to compel [testimony]" (Pet. App. 5a, citing *Blair* v. *United States,* 250 U.S. 273, 280 (1919)), the court rejected petitioners' contention that their reliance upon the protective order justified quashing the grand jury subpoena. The Fourth Circuit concluded that Rule 26(c), Fed. R. Civ. P., was not intended as a surrogate for either the Fifth Amendment or statutory immunity. When faced with the deposition notice, petitioners were entitled to invoke their Fifth Amendment privilege against self-incrimination or seek immunity from the federal prosecutor. They could not attempt to obtain the benefits of these protections by means of the Federal Rules of Civil Procedure (Pet. App. 6a):

> [T]he deponents' fifth amendment right against self-incrimination did not require, nor may it depend on, the shield of civil protective orders. Deponents were entitled to rely only on their own silence or a grant of immunity to protect their rights, otherwise they risked waiving those rights.

The court of appeals recognized that this might impose a difficult choice upon parties subject to deposition in civil litigation, but noted that petitioners were not parties to the civil litigation and, in any event, any adverse *civil* consequence attaching to their testimony was not within the protection afforded by the Fifth Amendment against compelled self-*incrimination* (*id.* at 7a-8a).

In concluding that the protective order did not provide sufficient grounds to quash the grand jury subpoena, the court also rejected petitioners' argument that the Second Circuit's decisions suggested a different result. Observing that "no court of appeals has directly addressed the issue in this case" (Pet. App. 10a), the court concluded that two Second Circuit cases involving the government's compulsory process supported its holding (*id.* at 10a-11a). See *United States* v. *GAF Corp.*, 596 F.2d 10 (1979) (court enforces federal statutory subpoena)[1] and *United States* v. *Davis*, 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983) (court enforces grand jury subpoena).[2]

ARGUMENT

The decision below is correct and does not conflict with any decisions of this Court or any other court of appeals.

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[1] The court also noted (Pet. App. 12a) that *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985), although distinguishable from the instant case and "difficult to reconcile with" *GAF Corporation*, would appear to "militate in favor of upholding the protective order here."

[2] Judge Sprouse dissented, observing that the majority's holding would "retard[ ] effective and informative discovery," by undermining the vitality of the Rule 26 protective order (Pet. App. 21a). While concurring in the majority's Fifth Amendment analysis, and stating that the deponents had "waived fifth amendment rights" (*id.* at 21a), Judge Sprouse concluded that the government should not be permitted "evidence it would not have obtained but for overriding a protective order" (*id.* at 22a).

Accordingly, no further review is warranted.

1. Petitioners' argument is based on the claim that they are entitled to rely upon Rule 26(c), Fed. R. Civ. P., to protect themselves against self-incrimination. The Fourth Circuit, however, was clearly correct in rejecting this claim. The privilege against self-incrimination is grounded in the Fifth Amendment to the Constitution, not in the Federal Rules of Civil Procedure. If petitioners believed that their testimony as third-party deponents might incriminate them, they were free to invoke the Fifth Amendment. *Pillsbury Co.* v. *Conboy,* 459 U.S. 248 (1983). Because they failed to assert the privilege with respect to that testimony, they have lost it. *United States* v. *Kordel,* 397 U.S. 1 (1970) (witness who failed to assert privilege with respect to interrogatories could not then claim that the government was barred from using them in a parallel criminal proceeding); see also *Garner* v. *United States,* 424 U.S. 648 (1976) (incriminating disclosures made without claiming privilege on compelled tax returns may be used in criminal prosecution over defendant's Fifth Amendment objection).

The Fourth Circuit recognized the potential hardship in requiring a deponent in a civil action to choose between waiving his privilege or refusing to testify in reliance on it, but correctly concluded that the Fifth Amendment does not protect against the need to make such hard choices. Cf. *McGautha* v. *California,* 402 U.S. 183, 215-216 (1971). Indeed, the Fifth Amendment was intended to prevent compelled self-incrimination, not every potentially adverse consequence that might arise in a civil action because a witness asserted the privilege. See *Lefkowitz* v. *Cunningham,* 431 U.S. 801, 808 n.5 (1977). As this Court has stated, "the prevailing rule" is that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify * * *: the Amendment 'does not preclude the inference where the privilege is claimed by a

party to a civil cause.' " *Baxter* v. *Palmigiano*, 425 U.S. 308, 318 (1976) (quoting 8 J. Wigmore, *Evidence* 439 (McNaughton rev. 1961) (emphasis in original)). Thus, "at trial a civil defendant's silence may be used against him, even if that silence is an exercise of his constitutional privilege against self-incrimination." *National Acceptance Co.* v. *Bathalter*, 705 F.2d 924, 929 (7th Cir. 1983).

The Fourth Circuit also correctly recognized that petitioners' claims of hardship were in fact exaggerated. Petitioners were third-party deponents in the civil action, and hence were not faced with the risks that litigating parties face when they choose not to testify. More importantly, petitioners must have been aware of the risk that the government would be able to obtain the depositions. Petitioners' own proposed standard for modifying a protective order leaves open the possibility that the government will obtain protected materials upon a showing of "compelling need" or "extraordinary circumstances" (Pet. 12). Under this standard, a potential witness concerned about self-incrimination cannot rely upon the protective order as an absolute protection against disclosure of the information. A compelling interest standard would in fact present sufficient uncertainty that an accused "would be reluctant, and perhaps foolish, to submit to discovery." Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 Harv. L. Rev. 1023, 1038 (1985).[3]

[3] See also Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1104 (1981) (labelling as "surely fallacious" petitioners' argument that a deponent will not invoke his privilege if a deposition is covered by Rule 26(c)); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018 at 153 (1970) ("It has been suggested that a protective order impounding the results of the discovery and forbidding disclosure to anyone other than the parties would remove the risk of incrimination, but whether the court, in a civil action, can provide protection equivalent to an immunity statute, as is needed if the claim of privilege is to be overcome, seems doubtful.").

What petitioners really seek through the device of a protective order is Fifth Amendment protection without the need actually to invoke the Fifth Amendment. They seek a right not to testify before the grand jury but nevertheless to retain the ability to testify in the civil action. The Fourth Circuit correctly recognized that this course of conduct is foreclosed by this Court's established Fifth Amendment jurisprudence. The Fifth Amendment may be invoked in civil actions. *Lefkowitz* v. *Cunningham*, 431 U.S. 801, 805 (1977). But even a mistaken failure to assert the privilege may still operate to waive it. See, *e.g.*, *Garner* v. *United States*, 424 U.S. at 654 n.9 (observing that *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), "[makes] clear that an individual may lose the benefit of the privilege without making a knowing and intelligent waiver"). Accordingly, this Court has held that information obtained by the government in a civil proceeding may be used in obtaining a criminal conviction. *United States* v. *Kordel*, 397 U.S. 1 (1970).

There is nothing, then, in the Fourth Circuit's decision that undermines petitioners' constitutionally protected interests. On the other hand, accepting petitioners' analysis would raise serious separation of powers issues. In petitioners' view, a protective order would amount to a grant of immunity for testimony given in the civil action. But as this Court stated in *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983): "No court has authority to immunize a witness. That responsibility * * * is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity." See 18 U.S.C. 6002 *et seq.* Concerned about this problem, the Fourth Circuit wisely refused to "authoriz[e] district courts to give civil deponents *de facto* grants of immunity in the guise of Rule 26 protective orders" (Pet. App. 14a).[4]

[4] Adoption of petitioners' preferred standard – "compelling need" – would also raise serious questions about the propriety of the civil trial

Contrary to petitioners' implication (Pet. 12), the Fourth Circuit's holding does not threaten to impede civil litigation. As the Fourth Circuit noted, there are a number of ways a trial court may manage litigation so as not to deprive civil litigants of their day in court because witnesses have chosen to rely upon the Fifth Amendment. These judicial management tools include the use of stays to delay discovery, pretrial hearings to assess the validity of the claimed privilege, and traditional rules of burden-shifting and evidence (Pet. App. 15a-16a). The interests of civil litigants in seeing their cases progress will not be significantly undermined by the Fourth Circuit's decision here.

Nor will the decision in this case interfere with the salutary effects of Rule 26(c) protective orders. Such orders will remain available to facilitate litigation by affording parties protection against disclosure to the public, or to competitors, or for any other reason listed in Rule 26(c). After this decision, as before, a court may enter a protective order whenever "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c).

On the other hand, if petitioners' position were accepted, the power of the grand jury would be seriously undermined. Denying enforcement of a grand jury subpoena strikes at the heart of the grand jury's right to all relevant evidence. *Branzburg* v. *Hayes*, 408 U.S. 665, 688 (1972); *Blair* v. *United States*, 250 U.S. 273, 282 (1919). Such a ruling not

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court's intervention in a criminal grand jury investigation. A court inquiring as to the "need" of the grand jury for evidence threatens to impinge on the grand jury's right to determine what is relevant and necessary to its investigation. See *Blair* v. *United States*, 250 U.S. 273 (1919). If the grand jury is "even to approach the proper performance of its constitutional mission, it must be free to pursue its investigations unhindered by external influence or supervision." *United States* v. *Dionisio*, 410 U.S. 1, 17 (1973).

only denies the grand jury access to information that may be critical to the investigation of substantive offenses, but also to testimony that may be the essence of a crime in itself—perjury. If a protective order shields deposition testimony from a grand jury subpoena, witnesses may be able with impunity to provide testimony in the civil action in direct conflict with the testimony subsequently given to the grand jury. Moreover, the grand jury must have the right to obtain evidence that it believes may be relevant to the government's charges. It has that right because it stands as the public's representative, as an intermediary " 'between the accuser and the accused.' " *Branzburg* v. *Hayes,* 408 U.S. at 687 n.23 (quoting *Wood* v. *Georgia,* 370 U.S. 375, 390 (1962)). Because the grand jury serves that important function, the public suffers when the grand jury is deprived of relevant evidence.

2. Petitioners contend that review is warranted because the decision below conflicts with Second Circuit decisions. Contrary to petitioners' implication, the Fourth Circuit did not hold here that a governmental entity, in all circumstances and by any means whatsoever, is entitled to information protected by a Rule 26(c) order; it decided only that a particular kind of process—a federal grand jury subpoena—is enforceable despite the existence of a civil protective order.

As the Fourth Circuit noted (Pet. App. 10a), the Second Circuit has never addressed that precise issue. The Second Circuit has been presented in a series of cases with differing kinds of attempts by the government to obtain materials governed by a civil protective order: an informal request by telephone and letter (*Martindell* v. *ITT,* 594 F.2d 291 (1979)); a request by motion to vacate a protective order (*Palmieri* v. *New York,* 779 F.2d 861 (1985); *Minpeco S.A.* v. *Conticommodity Services, Inc.,* 832 F.2d 739 (1987)); and a statutory civil investigative demand (*United States* v.

GAF Corp., 596 F.2d 10 (1979)). Petitioners' argument that the Second Circuit has undeviatingly followed a "compelling need" standard (Pet. 9), in asserted conflict with the ruling here (*id.* at 10), ignores the Second Circuit's careful practice of deciding these cases on their particular facts, and in particular the weight it has given to the nature of the government's demand.

In cases where the government seeks enforcement of a formal demand for materials protected by a Rule 26(c) order, as in this case, the Second Circuit's decisions are in accord with the Fourth Circuit's here: the government's compulsory process is enforced without a showing of "compelling need." In *United States* v. *GAF Corp., supra,* for example, the court enforced a federal civil investigative demand (CID)[5] issued by the Antitrust Division of the Department of Justice. Earlier, the government had sought to obtain the same materials by moving to modify a protective order. The motion was denied because the government's interest in the "possible" use of the information in a criminal investigation was " 'not clearly specified or specifiable in advance.' " *Id.* at 12 (quoting *GAF Corp.* v. *Eastman Kodak Co.*, 415 F. Supp. 129, 130, 133 (S.D.N.Y. 1976)). The Antitrust Division then decided to obtain the same materials by means of a CID, and petitioned for enforcement in the district court. *United States* v. *GAF Corp.*, 449 F. Supp. 351 (S.D.N.Y. 1978), rev'd, 596 F.2d 10 (2d Cir. 1979). On appeal, the Second Circuit rejected Kodak's argument that the protective order prevented enforcement of the government's formal process. Nowhere did the court indicate that the government's enforcement power was contingent upon the showing of a "compelling need" for the materials.

Petitioners thus err in contending that the Second Circuit has adopted a monolithic "compelling need" standard.

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[5] A CID is a statutorily authorized subpoena (15 U.S.C. 1312).

GAF proves the contrary; indeed, the differing results achieved by the government in the same case depending upon how it sought to obtain the protected materials is dramatic evidence that petitioners have failed to take into account a critical distinction essential to the Second Circuit's analysis.[6] Where the government has sought to enforce a formally authorized subpoena, as in *GAF* and here, the Second Circuit has not inquired about the government's "need" for the materials. Only where an informal demand is made—as, for example, by a motion to vacate a protective order—does the Second Circuit require that a compelling need be demonstrated. See *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985).[7]

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[6] Petitioners do not refer to *GAF*, a case upon which the court of appeals substantially relied (Pet. App. 10a-12a).

[7] The issue in *Palmieri*, upon which petitioners chiefly rely for their conflict claim, arose when the State of New York conducted an antitrust investigation and, in furtherance of its efforts, sought to obtain the terms of a settlement agreement that was subject to a protective order entered in a private federal civil action. Although a state grand jury had been impaneled for some time, the State Attorney General did not attempt to obtain the settlement agreement by using compulsory process; instead, the State filed a motion to lift the protective order. The district court granted the State's motion, and the Second Circuit reversed, concluding that the district court had erred in failing to find either a "compelling need" to modify the order or that the order was "improvidently granted" in the first instance. 779 F.2d at 865-866.

Essential to both the holding and analysis of *Palmieri* is the method by which the State chose to obtain the protected materials. In concluding that a compelling need was necessary to modify a protective order, the Second Circuit relied heavily on the existence of alternate means available to satisfy the State's desire for information. Noting the broad reach of the State's investigative powers, the Second Circuit stated (779 F.2d at 866 (citations omitted)):

> [T]he state has a special burden with respect to the materials that it seeks to unseal. * * * "[T]he federal government * * * ha[s] at its disposal special investigatory powers, not available

Thus, in *Martindell* v. *ITT,* 594 F.2d 291 (2d Cir. 1979), the government had attempted to obtain protected materials by requests over the telephone and by letter to the judge who had granted the protective order. The district court declined to modify the protective order, and the Second Circuit affirmed, emphasizing the informal nature of the request: "The Government may not * * * simply by picking up the telephone or writing a letter to the court * * * insinuate itself into a private lawsuit between others" (*id.* at 294).[8]

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to private litigants * * *." We note that the State of New York enjoys a similar privileged position with respect to its investigatory powers. For example, it has the power to subpoena persons and documents before the grand jury * * *.

By emphasizing the alternate means available, the court implicitly distinguished between cases in which the government moves to modify a protective order and cases in which the government issues, and seeks enforcement of, compulsory grand jury process. To the *Palmieri* court, it was not simply a matter of form whether the State proceeded indirectly by means of a motion to modify or directly by a grand jury subpoena: the method was a measure of the degree of the government's interest. The Second Circuit was reluctant to permit interference in civil litigation based solely upon the State's representation in its moving papers that it needed the materials for its grand jury investigation when the grand jury itself had failed to express its interest directly through a subpoena. *Id.* at 865-866.

Since *Palmieri,* the Second Circuit has confirmed that should the government express its interest in protected materials by means of a motion to modify a protective order, it will be held to a compelling need standard. *Minpeco S.A.* v. *Conticommodity Services, Inc.,* 832 F.2d 739 (1987); *H.L. Hayden Co.* v. *Siemens Medical Systems,* 797 F.2d 85 (1986). Petitioners claim that *Minpeco* and *Palmieri* involved "formal" means, unlike the same court's decision in *Martindell* (Pet. 10 n.2). But neither *Minpeco* nor *Palmieri* involved a grand jury subpoena as is the case here. See *United States* v. *Davis,* 702 F.2d 418, 422 (2d Cir.) (distinguishing between proceeding by motion to modify and use of grand jury process), cert. denied, 463 U.S. 1215 (1983).

[8] The *Martindell* court specifically noted that the government had discharged the grand jury investigating the matter and "apparently

Subsequently, in *United States* v. *Davis,* 702 F.2d 418, cert. denied, 463 U.S. 1215 (1983), the Second Circuit was faced with a case involving formal grand jury process. Grand jury subpoenas had been issued for deposition testimony given in a prior civil action in Bankruptcy Court. A claim was made that the deposition was protected from disclosure by a confidentiality agreement. Ultimately, the Second Circuit rejected that argument because the deposition was protected only by a tentative understanding, not by a Rule 26(c) protective order. In analyzing the issue, however, the Second Circuit expressly declined to apply the *Martindell* standard, because the informal demand in that case was an attempt by the government to proceed "outside of its usual investigative powers to secure the requested testimony, not by grand jury subpoena" (702 F.2d at 422).

In sum, the Fourth Circuit's decision here comports with this Court's decisions and is not in conflict with the decisions of the Second Circuit or with the decisions of any other court of appeals. In the absence of such a conflict, there is no need for further review.

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chose not to use grand jury investigative processes to obtain the[ ] testimony" (594 F.2d at 296 n.5). The Second Circuit went on to distinguish the issue presented here: "[W]e are not called upon in the present case to decide whether the Government might be entitled to enforcement of a subpoena compelling production of the depositions" (*id.* at 296 n.6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOHN DOES 1-4,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

The United States in its brief in opposition to the petition for a writ of certiorari urges this Court to endorse the *per se* rule announced by the court below that a federal grand jury's demand for evidence always takes priority over the competing imperatives of civil litigation. It argues that a protective order carefully fashioned by one district court judge to protect deposition testimony that never would have been given but for the existence of the protective order may always be ignored or overridden by a district judge in another district in the interest of criminal law enforcement. Finally, in an effort to persuade this Court that there is no conflict between the decision below and decisions of the Second Circuit, the government misreads or mischaracterizes directly conflicting Second Circuit cases that articulate a reasoned, practical balancing approach to the competing needs of civil litigation and federal law enforcement.

ARGUMENT

1. The government's argument is predicated on the preeminence of the grand jury and the importance of criminal law enforcement, the acknowledged concept that the Fifth Amendment sometimes imposes hard but not unconstitutional choices on those who may wish to assert it, the

related notion that those who fail to assert the Fifth Amendment privilege may find themselves having waived it for other purposes or in other contexts,[1] and the fact that its invocation by parties in civil cases may lead to adverse inferences being drawn against them. All of this misses the point.

The issue in this case is whether a federal district court judge, in an effort to manage his civil litigation docket and to permit the parties in litigation before him to depose relevant witnesses before trial, has the power and authority to issue a protective order shielding certain deposition transcripts from disclosure, and whether the witnesses whom he seeks to protect may rely on the order of the court in deciding whether to testify. If this Court concludes that there is no such power or authority where criminal law enforcement is involved or that the grand jury's subpoena power always takes precedence over civil protective orders, future witnesses who know that a grand jury may be investigating matters relating to the civil litigation will not rely on such protective orders and simply will refuse to testify. If that is the law, in the future neither the parties to the civil litigation nor the grand jury will have the benefit of the deposition testimony because it will not exist.

2. In related arguments, the government contends that the holding below "does not threaten to impede civil litigation" because there exist other more effective "judicial management tools" (Reply at 8), and that the protective order entered here could not properly be relied upon by petitioners "as an absolute protection against disclosure of information" because even under the Second Circuit's "compelling need" test there is always the possibility that the order will be modified. Reply at 6.

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[1] The government overstates the law on this point. *See, e.g., In re Morganroth*, 718 F.2d 161, 165 (6th Cir. 1983); *In re Beery*, 680 F2d. 705, 720 n.7 (10th Cir.), *cert. denied*, 459 U.S. 1037 (1982); *United States* v. *Licavoli*, 604 F.2d 613, 623 (9th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980); *Carter-Wallace, Inc.* v. *Hartz Mountain Industries*, 553 F. Supp. 45, 50 (S.D.N.Y. 1982).

The facts of this case provide the answer to the government's argument. At the time they were subpoenaed to testify as witnesses in September 1986, petitioners knew that a grand jury had been convened in Baltimore to investigate the events leading up to the failure of Community Savings and Loan and its EPIC group of subsidiaries but they did not know the scope of the investigation and had not been advised of their status before the grand jury and the prosecutors. Concerned about the grand jury investigation but lacking sufficient information to make tactical judgments, aware of the atmosphere in Maryland in the wake of the savings and loan crisis and the public attention paid to it, and knowing that with the passage of time their course would become clearer, petitioners moved for a stay of their depositions. The district court, however, denied the motion for stay and proposed a protective order instead, concluding that the litigants in the civil case had a right to complete discovery and move their case forward to trial rather than await the uncertain timing of the outcome of the grand jury investigation, an investigation that is still not completed even now, 20 months after entry of the protective order.

The government's glib suggestion (Reply at 8) that the court should not have entered a protective order but instead a stay or some other of available "judicial management tools" necessarily would mean that the related civil litigation involved here, or at least important depositions, would still be stayed awaiting action by the government. The decision whether to grant a stay in such circumstances or to choose some other method is properly a matter of discretion for the trial judge, who must generally apply a balancing test in considering the interests of the parties and witnesses. Had one of the "judicial management tools" recommended by the government been used by the district court here, it is likely that neither the civil litigation nor the criminal investigation would have made much progress. As a practical matter in the present world of increasing numbers of parallel civil, criminal and administrative proceedings all growing out of the same events and transactions, it is unrealistic to

suggest, as the government does (Reply at 8), that the decision below and the traditional salutary purposes of Rule 26(c) protective orders can coexist.

As for the level of protection provided by the protective order, petitioners always knew it was limited but they relied on the terms of the order, which expressly provided for modification by the issuing court or any other court having jurisdiction over the trial of the civil cases, and on the good faith and understanding of the judge who had entered it. In agreeing to the terms of the order, petitioners assumed the risk that modification could occur in the future. They did not, however, assume the risk that the modification could be imposed unilaterally by another district court without any deference to the court that entered the order in the first place. The proper procedure for the government was to ask the court that entered the protective order to modify it and to demonstrate on the particular facts the "compelling needs" of criminal law enforcement to override the concerns for the just, speedy and efficient resolution of the civil dispute which initially gave rise to the protective order.[2]

3. The government argues that there is no conflict between the decision below and decisions of the Second

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[2] Contrary to the government's argument, the protective order does not constitute a judicial grant of immunity. Reply at 7. The government is free to prosecute petitioners based on the information it gathers with the powerful tools available to it and the grand jury, and it is free to intervene in the civil case and request modification of the order upon a suitable showing to the court that entered the order. The government, however, cannot transform the civil protective order into a grant of immunity simply by choosing to ignore the order and its modification provisions whenever it is convenient to do so.

Nor is it proper for the government, of all litigants, to place two co-equal district court judges in conflict with each other by prevailing upon one, in the name of criminal law enforcement, to ignore or overrule the order of the other. Contrary to the government's assertion (Reply at 7-8 n.4), requiring it to seek modification of the protective order from the court that entered it is consistent with notions of comity and proper judicial administration and in no way impinges on the prerogatives of the grand jury. *United States* v. *Davis*, 702 F.2d 418, 423 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983); *see Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 225-226, 228-231 (1979); *cf. Illinois* v. *Abbott & Associates*, 460 U.S. 557, 573 (1983).

Circuit, contending that the Second Circuit has applied the "compelling need" standard only where "an informal demand" for information is made by the government (Reply at 11) and has expressly or "implicitly" declined to apply it where the government seeks enforcement of "a formal demand for materials" governed by a protective order. Reply at 10. According to the government, in the Second Circuit it is the "nature" of the government demand and the "method" it uses that are crucial. Reply at 11 n.7.[3] The government argues that a more formal demand indicates a greater degree of governmental interest, and when there is a formal demand no showing of "compelling need" is required. Reply at 10-12.[4] This analytical predicate for the conclusion that there is no conflict in the circuits is ingenious, convoluted and wrong.

In *United States* v. *GAF Corp.*, 596 F.2d 10 (2d Cir. 1979), GAF Corporation was the plaintiff in civil litigation against Eastman Kodak, which also was a target of an antitrust investigation. GAF obtained documents from Kodak in discovery in the civil litigation. Then the Antitrust Division sought the Eastman Kodak documents through a civil investigative demand served on GAF. Because corporate documents were involved no Fifth Amendment privilege existed and none could be asserted either in the civil case or in response to the CID. Furthermore, as the court noted on rehearing in *GAF*, the documents sought by the CID, which

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[3] Under the government's view, because *United States* v. *GAF Corp.*, 596 F.2d 10 (2d Cir. 1979) and *United States* v. *Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), involved "formal" demands, the Second Circuit did not require a showing of "compelling need"; because *Martindell* v. *ITT*, 594 F.2d 291 (2d Cir. 1979), *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985) and *Minpeco* v. *Conticommodity Services*, 832 F.2d 739 (2d Cir. 1987), involved "informal" requests, a showing of "compelling need" was required.

[4] Parenthetically we note that there is something anomalous in a formulation that requires a showing of "compelling need" when the government has shown a "lesser degree of interest" in the information and no showing at all when the governmental interest is great enough to justify use of its most awesome investigative tool, the grand jury. In such case it hardly seems appropriate for it also to exploit the fruits of civil litigation without some showing of need.

were not privileged, would have been directly available to the government by subpoena, and its ruling upholding the CID merely conserved judicial resources without creating any additional or overreaching powers for the government. *United States* v. *GAF Corp.*, 596 F.2d at 19.[5] Significantly, *GAF*—which the government chastises petitioners for failing to cite (Reply at 11, n.6)—did not involve any attempt by the government to obtain witness *testimony* by using formal governmental process to obtain transcripts of depositions taken in the civil litigation, the very question at issue here.

The distinction, then, is between the nature of the material sought, not the nature of the government demand. This was made clear by the Second Circuit in *Martindell* v. *ITT*, 594 F.2d 291 (2d Cir. 1979), decided five days after its *GAF* decision:

> However, we are not called upon in the present case to decide whether the Government might be entitled to enforcement of a subpoena compelling production of the depositions. Moreover, although the Government, in *GAF* and *Zenith*, may have been seeking merely to short circuit statutory procedure in the interest of saving time and money, here it would be, under its own argument, creating a discovery power it does not presently possess.

Martindell v. *ITT*, 594 F.2d at 296 n.6.

The court in *Martindell* went on to recognize the importance of reliance by the private party on the terms of the protective order and stated that such reliance is much greater with respect to testimony of "a witness who would, absent the protective order, have invoked his privilege and given no testimony at all" than it is with respect to preexisting documents. *Martindell* v. *ITT*, 594 F.2d at 297 n.8.

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[5] The court suggested in *GAF* that any documents sought by the CID subject to an outstanding protective order might be obtained by the government's seeking modification of the protective order and expressly stated that an application for modification should be made "to the judge who is in control of the private litigation in which it is still pending." *United States* v. *GAF Corp.*, 596 F.2d at 16. *See id.* at 19 (on rehearing).

Furthermore, on rehearing in *GAF* the Second Circuit specifically distinguished *GAF* from *Martindell:*

> The *ITT* panel did not deal with a CID authorized by a statute. . . . what was sought by the Government in ITT was the *deposition testimony* of witnesses on a matter delicate enough to have counselled the invoking of a claim of constitutional privilege against self-incrimination, which claim of privilege was foregone on an explicit agreement between the parties sanctioned by protective order for limited use of that testimony.

United States v. *GAF Corp.*, 596 F.2d at 18 (emphasis in original).

Thus, the distinction between *GAF* and *Martindell* is not between formal process and informal request but the nature of the material sought to be protected. In the case of corporate documents, there was no need for a showing of compelling need because they were not even arguably protected by the Fifth Amendment. In the case of witness testimony that would not even have existed but for the civil litigation and a protective order entered by the judge in the civil case, the government was entitled to it only on a showing of compelling need. The same is true here. But for the protective order in this case, there would have been no deposition transcripts for the grand jury to subpoena.

The government also argues that the Second Circuit applied the "compelling need" standard in its recent decision in *Palmieri* v. *New York*, 779 F.2d 861 (2d Cir. 1985), only because *Palmieri* involved an "informal demand" for information and thus demonstrated a lesser degree of governmental interest. Reply at 11-12 n.7. The facts of *Palmieri* fail to prove the government's point. It is true that the government in *Palmieri* initially sought to intervene in the civil proceeding in order to vacate the protective order, but while that motion was pending it issued a grand jury subpoena *ad testificandum* to a party to the protective order. After litigation concerning the subpoena, the government was enjoined from questioning the witnesses in the grand jury on any matter relating to the matters subject to the protective order pending resolution of the motion to quash.

Palmieri v. *New York*, 779 F.2d at 864. Thus, in *Palmieri* the government attempted to obtain the protected materials both by seeking to modify the protective order and by issuing a grand jury subpoena. In that situation the Second Circuit required a showing of compelling need. *Cf. Minpeco* v. *Conticommodity Services*, 832 F.2d (2d Cir. 1987).

Finally, the government attempts to rely upon *United States* v. *Davis*, 702 F.2d 418 (2d Cir.), *cert. denied*, 463 U.S. 1215 (1983), for its position that the Second Circuit's "compelling need" standard does not apply where the demand for information is by formal process. Reply at 13. There a federal grand jury through subpoena obtained documents and deposition transcripts that had been filed under an unwritten understanding of confidentiality. The Second Circuit in *Davis* recognized the appropriateness of balancing the needs of the civil and criminal justice systems and acknowledged the "compelling need" formulation used in *Martindell*. It had no occasion to apply the standard on the facts of the case before it, however, because there was no protective order entered by the district court and no reliance even on the unwritten "understanding" of confidentiality among counsel. Indeed, the lack of reliance was the most crucial factor cited by the court in *Davis*. 702 F.2d at 422. *Davis* simply did not involve the issue in this case, where a federal judge issued a written protective order because of Fifth Amendment concerns, petitioners clearly relied on its terms in determining how to proceed at their depositions and the government chose to ignore the court's order, relying instead on the assumed preeminence of the grand jury and the importance of criminal law enforcement.

CONCLUSION

For the foregoing reasons and for those set forth in the petition, the petition for a writ of certiorari should be granted.

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